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Supreme Court, U.S.
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No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ELWIN F. HOLMES,
Petitioner,

v.

FRANCES SUE P. HOLMES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTION PRESENTED

Whether state courts, consistent with the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Sec. 1408 (1982 ed. and Supp. V), may treat, as property divisible upon divorce, a portion of military retirement pay waived by the retiree in order to receive physical disability benefits under Chapter 61, Section 1201 of Title 10 of the United States Code.

LIST OF PARTIES

Plaintiff-Petitioner is Elwin F. Holmes

Defendant-Respondent is Frances Sue P. Holmes

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OCTOBER TERM, 1989

No. 89-

ELWIN F. HOLMES,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Elwin F. Holmes petitions for a writ of certiorari to review an opinion and judgment of the Supreme Court of Virginia entered on April 26, 1989. The Supreme Court of Virginia affirmed the opinion and judgment of the Court of Appeals of Virginia by ruling that there is no reversible error in the judgment complained of and refusing the petition for appeal.

OPINIONS BELOW

The decision of the Supreme Court of Virginia is unreported. It appears in the Appendix at 1a. The decision of the Court of Appeals of Virginia is reported at 5 V.L.R. 1259 (Ct. App. Va., 1988). It appears in the Appendix at 2a. The opinion letters of the Circuit Court for Frederick County are unreported. They appear in the Appendix at 19a, 23a, 28a, 39a, 42a and 59a.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on April 26, 1989. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3) (1982).

STATUTES INVOLVED

10 U.S.C. Sec. 1201 (1982 and Supp. V)

> Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay . . . is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the Secretary may retire the member, with retired pay computed under section 1401 of this title [10 USC Sec. 1401], if the Secretary also determines that—
>
> > (1) based upon accepted medical principles, the disability is of a permanent nature and stable;
> >
> > (2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized leave; and
> >
> > (3) . . .
> >
> > > (A) the member has at least 20 years of service computed under section 1208 of this title [10 USC Sec. 1208].

Former Spouses Protection Act, Pub. L. No. 97-252, 96 Stat. 730-31 (1982) (emphasis added).

> (4) "Disposable retired . . . pay" means the total monthly retired . . . pay to which a member is entitled (*other than the retired pay of a member retired for disability under chapter 61 of [Title 10]*) less amounts which . . .
>
> . . . .
>
> > (E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage);

10 U.S.C. Sec. 1408(a)(4)(A-E) (1982 and Supp. V) (Former Spouses Protection Act) (emphasis added). *See* 1987 Department of Defense Authorization Act, Pub. L. No. 99-661, 100 Stat. 3816 (November 14, 1986)

> (4) "Disposable retired . . . pay" means the total monthly retired . . . pay to which a member is entitled *less amounts which—*
>
> (A) are owed by that member to the United States;
>
> (B) are required by law to be and are deducted from the retired . . . pay of such member, including fines and forfeitures order by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38 [veterans disability benefits; [and]
>
> . . . .
>
> (E) *in the case of a member entitled to retired pay under chapter 61 of [Title 10], are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired.*

STATEMENT OF THE CASE

A. Air Force Career

Petitioner, Elwin F. Holmes, and his wife, Frances Sue P. Holmes, Respondent, were married in San Antonio, Texas on *March 7, 1942*. On the same day, Petitioner entered the U.S. Air Force (U.S. Army Air Force) where he served as an officer for approximately 30 years until he retired as a Colonel on *August 11, 1971*. When he retired from the U.S. Air Force, Petitioner was in ill health suffering from atheriosclerosis and two ruptured discs in his spine. In addition, he had undergone two operations for poor circulation in his right leg. Because

of his poor health, Petitioner was declared physically unfit for duty and was separated from the U.S. Air Force pursuant to Chapter 61 of Title 10 of the United States Code. 10 U.S.C. Sec. 1201 (1982 and Supp. V).

B. Divorce Action

On *April 19, 1983*, approximately twelve years after he retired from the Air Force, Petitioner filed for divorce from his wife, the Respondent. On *April 25, 1983*, six days later, Respondent filed for a divorce from Petitioner. On *June 13, 1983*, the two divorce actions were consolidated and a joint hearing was held. At the time, Petitioner was 64-years-old and Respondent was 62-years-old.

On *August 3, 1983*, the trial court granted Petitioner a divorce based on a one-year separation. The trial court awarded Respondent temporary spousal support and continued to a later date matters concerning equitable distribution of the joint marital property and permanent spousal support.

C. Computation of Retirement and Disability Pay

One of the items the trial court reserved for further consideration was division of Petitioner's military retirement pay. As a retired Colonel with almost 30 years of active duty military service, Petitioner was entitled to a pension equal to 75% of his Air Force basic pay.[1] On *August 3, 1983*, the date of his divorce, Petitioner's basic pay was *$4,720.00* per month. Seventy-five percent of his basic pay was *$3,540.00* ($4,720.00 × .75 = $3,540.00). At the time of his divorce, therefore, Petitioner was en-

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[1] Members of the Armed Forces who serve 20 years or more on active duty generally are eligible to retire and receive a pension. 10 U.S.C. Sec. 8911 *et seq.* (1982 and Supp. V) (Air Force); 10 U.S.C. Sec. 3911 *et seq.* (1982 and Supp. V) (Army); 10 U.S.C. Sec. 6323 *et seq.* (1982 and Supp. V) (Navy and Marine Corps).

titled to collect *$3,540.00* per month in longevity retirement pay.[2]

When he retired, the U.S. Air Force determined that Petitioner was 70% physically disabled as a result of injuries he received in three major wars and the Berlin Airlift.[3] A 70% disability rating means that Petitioner

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[2] *See* the following papers lodged with the Clerk of the Court: (1) Air Force Retiree Annuitant Account Statement (April 30, 1983); (2) Vertification of Pay Information (February 23, 1989); and (3) DD Form 214 Armed Forces of the United States Report of Transfer or Discharge (August 11, 1971). The amount of pay a retired military member receives in retirement each month depends on the length of service or the percentage of disability and the member's rank. *See* 10 U.S.C. Sec. 1401 (1982 and Supp. V). *See generally* 10 U.S.C. Sec. 8929 (1982) (Air Force); 10 U.S.C. Secs. 3926 and 3991 *et seq.* (1982 and Supp. V) (Army); 10 U.S.C. Secs, 6322-27 *et seq.* (1982 and Supp. V) (Navy and Marine Corps).

[3] Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay . . . is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the Secretary may retire the member, with retired pay computed under section 1401 of this title [10 USC Sec. 1401], if the Secretary also determines that—

> (i) based upon accepted medical principles, the disability is of a permanent nature and stable;
>
> (2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized leave; and
>
> (3) . . .
>
> > (A) the member has at least 20 years of service computed under section 1208 of this title [10 USC Sec. 1208].

10 U.S.C. Sec. 1201 (1982 and Supp. V). *See also* 38 U.S.C. 310 (wartime disability); Sec. 331 (peacetime disability) (1982 and Supp. V). The amount of the disability awarded to a retired service member is based on the type of injury received and the extent to which it impairs the service member's ability to earn a living. 38 U.S.C. Secs. 314 and 355 (1982 and Supp. V).

is entitled to receive 70% of his basic pay in disability pay.[4] On August 3, 1983, Petitioner's basic pay was *$4,720.00* per month. Seventy percent of his *$4,720.00* basic pay is *$3,304.00* and this is what the Petitioner was entitled to receive in disability pay from the Air Force each month ($4,720.00 x .70% = $3,304.00).[5]

Between his 75% longevity retirement pay and his 70% physcial disability pay, Petitioner was eligible to collect $6,844.00 in pay per month when he retired from the Air Force ($3,540.00 (longevity pay) + $3,304.00 (disability pay) = $6,844.00 (total)). Petitioner could not collect this amount, however, because federal law prohibits military retirees from collecting dual payments, that is, both longevity retirement pay and physical disability pay.[6] Under federal law, the maximum compensation retired military personnel can receive is 75% of the member's basic pay at the time of retirement.[7]

While federal law prohibits military retirees from receiving both military retirement pay and physical disability pay, it permits military retirees to waive a percentage of their retired pay in order to accept the physical disability pay to which they are entitled.[8] As a prac-

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[4] 10 U.S.C. Sec. 1401 (1982 and Supp. V) provides that the amount of disability pay a member of the armed forces is entitled to receive is determined by multiplying the percentage of disability by the amount of the member's basic pay at retirement.

[5] *Id.*

[6] *See* Act of March 3, 1881, chap. 548, 26 Stat. 1082; Act of Jul. 27, 1882, chap. 277, 27 Stat. 282; Act of May 9, 1900, chap. 385, 31 Stat. 171; Act of Feb. 6, 1907, chap. 468, 34 Stat. 879; Act of May 11, 1912, chap. 123, 37 Stat. 113; Act of June 5, 1920, chap. 245, 41 Stat. 982; Act of Jun 7, 1924, chap. 320, 43 Stat. 623.

[7] 10 U.S.C. Sec. 1401 (1982 and Supp. V) (computation of re-

[8] "For example, if a military retiree is eligible for $1500 a month in retirement pay and $500 a month in disability benefits, he must waive $500 of retirement pay before he can receive any

tical matter, retired military personnel who are entitled to receive physical disability payments elect to waive a portion of their longevity retirement pay in order to receive physical disability pay. They do this because physical disability payments are nontaxable.[9]

In Petitioner's case, he elected to accept $3,304.00 per month in physical disability pay in lieu of $3,304.00 per month in longevity retirement pay. Each month therefore, Petitioner receives a check for *$3,540.00*, *$3,304.00* of which is physical disability pay and *$236.00* of which is longevity retirement pay.[10]

D. Division of Marital Assets

Numerous hearings were held by the trial court on the distribution of the joint marital property and on the award of permanent spousal support. To aid the trial court in resolving these matters, Petitioner provided the trial court with a copy of Section 1408 of the Uniform Services Former Spouses Protection Act (Former Spouses Protection Act).[11] In addition, Petitioner presented evi-

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disability benefits." *Mansell v. Mansell*, —— U.S. —— (No. 87-201, May 30 1989) (Slip opinion at 2 n.1). *See* Act of May 27, 1944, chap. 209, 58 Stat. 230. *See also* 38 U.S.C. Sec. 3105 (1982 and Supp. V).

[9] 26 U.S.C. Sec. 104(a)(4) (1982). "Because disability benefits are exempt from federal, state, and local taxation, Sec. 3101(a), military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income." *Mansell v. Mansell*, —— U.S. —— (No. 87-201, May 30, 1989) (Slip Opinion at 2). *See* 38 U.S.C. 3101(a) (1982 and Supp. V).

[10] The $3,304.00 Petitioner received in physical disability pay was not taxable, but the $236.00 he received in longevity retirement pay was taxable.

[11] 10 U.S.C. Sec. 1408 (1982). At the time, the Former Spouses Protection Act specifically excluded Chapter 61 retired physical disability payments from division in state divorce actions.

dence to the trial court which showed that his taxable income or "disposable retired pay" was $236.00 per month. (*See* Air Force Retiree Annuitant Account Statement (April 30, 1983) and Verification of Pay (February 23, 1989) lodged with the Clerk of Court.)

In addition to this evidence, Petitioner testified about his retired and disability pay. In his testimony, however, Petitioner misstated the amount of "disposable retired pay" he was receiving. Rather than informing the trial court (1) that his longevity retired pay was *$3,540.00* per month [12]; (2) that his physical disability pay was *$3,304.00* per month [13]; and that his disposable retired pay was *$236.00* (the difference between the amount of his longevity pay and physical disability pay),[14] Petitioner testified (1) that his longevity pay was *$3,540.00* [15]; (2) that his disability pay was *$2,478.00* [16] and (3) that his disposable retired pay was *$1,062.00.*[17] Petitioner's mistake concerning the amount of his "disposable retired pay," namely testifying that it was *$1,062.00* per month rather than *$236.00* per month, was due to a misunderstanding of federal law.

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[12] $4,720.00 (basic pay) × .75% (percentage of pay for figuring retirement) = $3,540.00 (longevity retired pay)

[13] $4,720.00 (basic pay) × 70% (disability rating) = $3,304.00 (physical disability pay)

[14] $3,540.00 (longevity pay)—$3,304.00 (disability pay) = $236.00 (disposable retired pay)

[15] $4,720.00 (basic pay) × .75% (percentage of pay for figuring retirement) = $3,540.00 (longevity pay)

[16] $3,540.00 (longevity pay) × 70% (percentage of pay for figuring retirement) = $2,478.00 (disability pay)

[17] Petitioner arrived at his $1,062 figure by multiplying 70% times his longevity pay, $3,540.00, for a total of $2,478.00 ($3,540.00 × 70% = $2,478.00). He then subtracted $2,478.00 from his longevity pay ($3,540.00) which resulted in a figure of $1,062.00 ($3,540.00 (longevity pay)—$2,478.00 (disability pay) = $1,062.00 (disposable retired pay)).

E. Trial Court's Opinion

On *March 28, 1985*, the trial court issued an opinion directing distribution of the couple's marital assets. The distribution of assets included a division of the Petitioner's "disposable retired pay." In dividing Petitioner's "disposable retired pay" between the parties, the trial court used the *$1,062.00* figure supplied by Petitioner, rather than the *$236.00* figure which appeared in the evidence Petitioner submitted to the Court.

> While Elwin's [nondisability] retired pay is $1,062[.00], his monthly government life insurance premium is $19.00. The latter figure is deductible to arrive at 'disposable retired or retainer pay' under subsection (a)(4)(E) of 10 USC Section 1408, resulting in a figure of $1,043.00, or $12,516.00 annually. He was sixty-four at the date of the divorce and the [life expectancy] factor to be used under Section 55-261 is 7.718. This multiplied by the annual amount gives a present value of Elwin's retirement benefits as of the date of divorce of $96,598.00.

(*See* Appendix 47a). In determining what proportion of the *$1043.00* in "disposable retired pay" should be awarded to Respondent, the trial court recognized that—

> virtually all of the existing intangible marital property is directly related to [Petitioner's] vocational endeavors away from the comforts and security of home and out in the competitive and sometimes harsh realities of the workaday world. For those reasons it appears to the Court right and just that he should retain [60% and she 40%] of these categories of marital property.

Id. at 53a. The trial court noted that "Elwin's *military disability benefits* must be excluded from the marital property of the parties and must not be used to give an indirect effect in the equitable distribution of that property." *Id.* at 48a (emphasis added).

F. Exceptions to the Trial Court's March 28, 1985 Opinion

On *April 10, 1985*, shortly after he received the trial court's March 28, 1985 opinion, Petitioner filed a Memorandum of Exceptions to the trial court's opinion. In the Memorandum, Petitioner argued that—

> [T]he Court's opinion indicates that the [Petitioner's] Armed Forces Retirement Pay, at its present value is marital property [47a]. The Court's finding is contrary to the plain meaning under 10 USC Section 1408(a)(4). The *Plaintiff was retired from the Air Force as a service member under Chapter 61. Therefore, his retirement pay is excluded from divisibility at divorce.*

Memorandum of Exceptions (April 10, 1985). Petitioner's argument in this regard is supported by language in the Code of Federal Regulations which states that "for court orders issued on or before November 14, 1986 . . . disposable retired [pay] does not include retired pay of a member retired for disability under 10 U.S.C. Chapter 61." 32 CFR Chap. 1, Sec. 63.6(e)(2) (July 1, 1988).

In a further motion filed with the trial court on *April 22, 1985*, Petitioner argued more specifically that Section 1408(a)(4) of the Former Spouses Protection Act provides that:

> (4) "*Disposable retired* or retainer, *pay*" *means the total monthly retired pay* . . . to which a member is entitled (*other than the retired pay of a member retired for disability under chapter 61 of this title*) . . . .

Memorandum (April 22, 1985) (emphasis added). Petitioner argued that "*persons retired*[,] *other than for disability purposes under 10 USC 1201*[,] will have their pay subject to the provisions of Public Law 97-252 known as the Former Spouses Protection Act[,] but that those retired for disability purposes are exempt from division of their retirement pay as alimony or marital property as

provided in said act." *Id.* at 2 (emphasis added). In addition, the Petitioner again argued that in defining "disposable retired pay," the Former Spouses Protection Act specifically excludes the retired pay of a member retired for disability under Chapter 61, Title 10, U.S.C. Petitioner argued too that "there is a significant federal interest in protecting service members pay from distribution as marital property when service members are retired for disability purposes." *Id.*

G. Trial Court's Supplemental Opinion

On *December 17, 1985*, the trial court issued a Supplemental Opinion addressing the Petitioner's exceptions to the trial court's March 28, 1985 opinion. In its Supplemental Opinion, the trial court denied Petitioner's motion for reconsideration and motion for introduction of further evidence in light of the provisions of the Former Spouses Protection Act. In denying Petitioner's motions, the trial court stated that—

> [i]n view of the fact that the [Petitioner] introduced evidence, made representations and advanced a theory with respect to his disposable retirement income, and that [the court's] opinion was written accepting these and was based on them in this regard[,] the Court will not reconsider its prior opinion or admit additional evidence on the matter.

(*See* Appendix 30a) In addition, the trial court noted that "[f]or the sake of finality, expeditious disposition of cases and due regard for an opposing party[,] the other party cannot await an opinion based on his evidence and theory of an issue and then because he is *disappointed* in the results obtained seek a re-hearing in order to change his theory and evidence, hopefully to achieve a different result." *Id.* (emphasis added). Petitioner's maintains that his purpose in correcting his testimony as to the amount of his "disposable retired pay" was to correct the record and to apprise the court that its distribu-

tion of Petitioner's disability pay was in violation of federal law. It is Petitioner's contention that he had a duty to so advise the court, as soon as he learned that a mistake had been made and he became aware that the federal law was not being followed.

H. Motion for Rehearing

On *May 7, 1986*, Petitioner asked the trial court to rehear the evidence in the case on the grounds that its opinion was based on a "material mistake of fact." In asking the trial court to reexamine the evidence, Petitioner argued that "it is apparent from the record that *the disposable pay*, if any, of the [Petitioner] *is approximately $217.00 per month*, as set forth in the April, 1983 pay form submitted to the court, that is, $236.00 – $19.00, *rather than the $1062.00 per month* testified to by the [Petitioner]." Motion for Rehearing (May 7, 1986). In addition, Petitioner argued that an "error was made, and accepted by all of the parties hereto, because of a mistake . . . concerning the manner in which percentages of disability are used to figure monthly entitlements of military retirement pay."

> [The] error was material to the proceedings in that this Court in its letter opinion [of March 28, 1985] determined *that only non-disability retirement pay could be the subject of equitable distribution*, and such error amounts to a difference of approximately $800.00 per month. Calculations using the true figure of approximately $217.00 a month instead of the $1,043.00 a month [$1,062.00 minus $19.00 = $1,043.00], and using the Court's award of 40% of present value would yield a difference in the award to the Respondent of approximately $30,000.00.

Id. (emphasis added). In effect, Petitioner argued that he was not presenting new evidence, but rather was correcting a mistake made by the trial court in applying federal law to evidence which had been presented to it.

On *July 8, 1986*, the trial court denied Petitioner's Motion for Rehearing. While the trial court admitted that "no final decree on the point ha[d yet] been entered," the court nevertheless stated that the "findings and rulings contained in the opinion of March 28, 1985 are comparable to a jury verdict" and that "[t]o grant the petition would be in effect to order a new trial on the basis of after-discovered evidence on an important aspect of equitable distribution settled by that opinion." (*See* Appendix 24a). In addition, the court noted that "the evidence petitioner seeks to introduce now was available to the petitioner from the time of his filing his bill of complaint in April of 1983 and continued to be available to the time of the opinion rendered March 28, 1985." *Id.* "It is this long available evidence [which Petitioner] wishes to introduce now in substitution of his evidence given months before rendition of decision, which relied on that evidence and which decision he has found unpalatable." *Id.* at 25a. In sum, the trial court concluded that the litigation must come to an end, and "[e]nough is enough." *Id.*

On *December 1, 1986*, more than three and half years after Petitioner's divorce was granted by the trial court, more than eighteen months after the trial court issued its March 28, 1985 opinion, and more than eight months after it was advised of the mistake made in determining Petitioner's disability and disposable pay, the trial court issued a Final Decree in the case. (*See* Appendix 19a).

I. Appeal to the Court of Appeals of Virginia

On appeal to the Court of Appeals of Virginia, Petitioner argued that the trial court made a "material mistake of fact" concerning the amount of Petitioner's disposable retired pay available as a source of spousal support and for equitable distribution. Petitioner argued that he was in error when he testified that his "disposable retired pay" was $1,062.00 per month. He stated that

his testimony was erroneous because Section 1401 of Title 10 of the United States Code clearly provides that the amount of a retiree's monthly disability pay is determined by multiplying the retiree's "*monthly basic pay*" ($4,720.00) times the "percentage of his disability" (70%). In Petitioner's case, this yields a figure of *$3,304.00*.[18] Subtracting the *$3,540.00* in longevity pay leaves *$236.00* in "disposable retired pay." [19]

Unfortunately, Petitioner multiplied his "*longevity pay*" ($3,540.00) by his "percentage of his disability" (70%).[20] This resulted in a figure of $2,478.00 for his disability pay.[21] Subtracting $2,478.00 in physical disability pay from $3,540.00 in longevity pay left him with $1,062 in "disposable retired pay." [22]

On appeal, Petitioner argued that as soon as he discovered he made an error in calculating his "disposable retired pay," he filed a Memorandum with the trial court advising the court of the nature of the mistake and setting forth the correct method for determining his "disposable retired pay" under federal law. Because the trial court used the "wrong amount" in determining the amount available for equitable distribution, namely, *$1,043.00* per month rather than *$216.00* per month, Petitioner also argued that "the award [set by the trial court] violates the provisions of Section 20-107.3(G),

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[18] $4,720.00 × 70% = $3,304.00

[19] $3,540.00 (longevity pay)—$3,304.00 (disability pay) = $236.00 (disposable retired pay)

[20] Petitioner should have multiplied his "*monthly basic pay*" ($4,720.00) times his "percentage of his disability (70%)

[21] $3,540.00 (longevity pay) × 70% (percentage of disability) = $2,478.00 (disability pay)

[22] $3,540.00 (longevity pay)—$2,478.00 (disability pay) = $1,062 (disposable retired pay)

Code of Virginia,[23] since more than 50% of the disposable cash benefits received from [Petitioner's] pension have been awarded to [Respondent]." Brief of Appellant at 15, *Holmes v. Holmes*, 5 V.L.R. 1259 (Cir. Ct. Frederick Cty., Va., 1988).

In addition Petitioner argued on appeal that he "did not ask the Trial Court to order a new trial on the basis of after-discovered evidence as stated by the Trial Court at Page 2 of its Letter Opinion of July 8, 1986." (*See* Appendix 24a). Instead, Petitioner "asked the Trial Court to reconsider all the evidence already in the record on the basis of a mistake of a material fact." *Id.* at 16. On appeal, Petitioner also noted that he presented his request for the trial court to reexamine the evidence approximately 8 months before the trial court entered its Final Decree in the case.

On *December 20, 1988*, the Court of Appeals of Virginia denied Petitioner's appeal. The Court of Appeals initially ruled that "[a]lthough the trial judge's letter ruling did not specifically address the issue of whether there was an error on the face of the record, its ruling implies a finding that there was no such error." *Holmes v. Holmes*, 5 V.L.R. 1259, 1268 (Cir. Ct. Frederick Cty., 1988 (*See* Appendix 10a). The Court of Appeals then stated that the "trial judge's ruling . . . does not constitute an error on its face because 10 U.S.C. Section 1401 merely provides the basis to calculate the total retirement pay and does not designate the amounts of pay allotted to disability pay verses non-disability pay." *Id.* at 1269. (*See* Appendix 11a). In addition, the Court of Appeals

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[23] G. No part of any monetary award based upon the value of pension or retirement benefits, whether vested or nonvested, shall become effective until the party against whom such award is made actually begins to receive such benefits. *No such award shall exceed fifty percent of the cash benefits actually received by the party against whom such award is made.*

4A CODE OF VIRGINIA Sec. 20-107.3(G) (1983) (emphasis added).

noted that Petitioner did not object to the court's method for determining his "disposable retired pay" until after the trial court had entered its March 25, 1985 opinion. The Court of Appeals noted too that in reaching its decision, the trial court relied on Petitioner's testimony and affidavit in arriving at the $1043.00 figure for disposable retired income. *Id.* at 1270. *See* Appendix 11a. Finally, the Court of Appeals ruled that because Petitioner did not allege the discovery of new evidence or point out an error on the record, his petition for a rehearing was properly dismissed. *Id.* at 1271. *See* Appendix 12a.

J. Appeal to the Supreme Court of Virginia

On *January 13, 1989*, Petitioner appealed the decision of the Court of Appeals of Virginia to the Supreme Court of Virginia. On appeal, Petitioner argued that the trial court's actions in awarding a portion of Petitioner's retired military disability pay to the Respondent violates federal law and, hence, the Supremacy Clause of the Constittuion of the United States. Brief of Appellant at 2, *Holmes v. Holmes*, —— VA. —— (No. 890059, April 26, 1989) (unpublished opinion). After hearing oral argument, the Supreme Court of Virginia ruled that "there is no reversible error in the judgment complained of [and a]ccordingly, the Court refuses the petition for appeal." Order in *Holmes v. Holmes*, —— VA. —— (No. 890059, April 26, 1989) (unpublished opinion) (*See* Appendix 1a.

The Supreme Court of Virginia's decision concerning the division of Petitioner's disability pay is contrary to the Supreme Court of Idaho's decision in *Griggs v. Griggs*, 107 Idaho 123, 686 P.2d 68 (1984). In *Griggs* the Supreme Court of Idaho held that the trial court must "award that portion of the total payment received which has been designated as 'disability pay' in accordance with the segments of 10 U.S.C. Secs. 1401 and 1403, to the husband as his separate property". *Id.* at 128, 686 P.2d at 73.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Supreme Court should GRANT, VACATE, and REMAND this case in light of *Mansell v. Mansell*, —— U.S. —— (No. 87-201, May 30, 1989). There are three reasons why the Court should grant the petition for a writ of certiorari in this case, vacate the judgment below, and remand the case to the Supreme Court of Virginia for further consideration in light of *Mansell*.

First, the decision of the Supreme Court of Virginia is in direct conflict with the Supreme Court of the United States' recent decision in *Mansell v. Mansell*, —— U.S. —— (No. 87-201, May 30, 1989). *Second*, the decision of the Supreme Court of Virginia ignores the "plain and precise" language of Section 1408(a)(4)(E) of the Former Spouses Protection Act which states that "physical disability payments" received by a retired service member of the armed forces under Chapter 61 of Title 10 of the United States Code are not to be treated as "disposable retired . . . pay" for purposes of property division upon divorce. And *third*, the decision of the Supreme Court of Virginia ignores the provisions of Section 104(a)(4) (1982) of the Internal Revenue Code by reclassifying a portion of Petitioner's nontaxable disability pay as taxable longevity retirement pay, and treating it as marital property subject to division on divorce.

I. *Mansell v. Mansell*, —— U.S. —— (No. 87-201, May 30, 1989)

The issue in the present case is virtually identical to the issue decided by the Supreme Court of the United States in *Mansell v. Mansell*, —— U.S. —— (No. 87-204, May 30, 1989). In *Mansell*, the Court held that "the Former Spouses Protection Act does not grant state courts the power to treat, as property divisible upon divorce, military retirement pay that has been waived to receive veterans disability benefits." *Id.* at 13 (Slip opinion).

In *Mansell* the Appellant, a retired Air Force Major, was married to his wife for 23 years. In 1979, their marriage ended. As part of the property settlement agreement entered into between the parties, Major Mansell agreed to pay his wife "50 percent of his total military retirement pay, including a portion of retirement pay waived so that [he] could receive disability benefits." *Id.* at 4.

Four years later, in 1983, Major Mansell "asked the Superior Court to modify the divorce decree by removing the provision that required him to share his total retirement pay with Mrs. Mansell." *Id.* The Superior Court denied his request and Cailfornia Court of Appeal affirmed "reject[ing] that portion of Major Mansell's argument based on the Former Spouses Protection Act." *Id.* at 5. Major Mansell appealed the decision of the California Court of Appeals to the Supreme Court of California and the Supreme Court of California denied his petition. *Id.*

Major Mansell then appealed to the Supreme Court of the United States. In his appeal, Major Mansell argued that he had asserted the supremacy of federal law "in every forum available to him" and that the "California Courts . . . refused to address the issue." Jurisdictional Statement of Appellant at 6. He also argued "that the refusal [of the California Courts] to recognize the supremacy of federal law is an affront to the settled doctrine of federalism." *Id.*

> There can be no doubt [he argued] that Congress [in the Former Spouses Protection Act] granted the states a limited right to divide 'disposable retired pay.' However, Section (a)(4) of the Act removes any ambiguity as the meaning of 'disposable' by expressly defining what the state courts may divide.

Id. at 8. In support of his position, Major Mansell argued that Section 1408(a)(4) of the Act clearly defines 'disposable retired . . . pay" as follows:

> (4) "Disposable retired . . . pay" means the total monthly retired . . . pay to which a member is entitled *less amounts* which—
>
> (A) are owed by that member to the United States;
>
> (B) *are* required by law to be and are deducted from the retired . . . pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts *waived in order to receive compensation under* title 5 or *title 38*[, that is, veterans disability benefits].

Id. (emphasis added). Major Mansell argued that "[t]here is no ambiguity whatsoever in section 1408(a)(4)" and that Congress unequivocally stated and intended to exclude from division by the state courts those "amounts waived in order to receive [veterans disability benefits] under . . . title 38.' *Id.*

The facts in the present case are similar to the facts in *Mansell* except that the disability payments received by Petitioner are "physical disability payments" awarded him under Chapter 61 of Title 10 rather than "veterans disability benefits" awarded to Mansell under Title 38. As in the case of "veterans disability benefits" received by Mansell under Title 38, "physical disability benefits" received by Petitioner under Chapter 61 of Title 10 are specifically exempted from "disposable retired . . . pay" under Section 1408(a)(4)(E) of the Former Spouses Protection Act.

Section 1408(a)(4)(E) of the Former Spouses Protection Act provides are follows:

> (4) "Disposable retired . . . pay" means the total monthly retired . . . pay to which a member is entitled *less amounts which*—
>
> (A) are owed by that member to the United States;

> (B) are required by law to be and are deducted from the retired . . . pay of such member, including fines and forfeitures order by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38 [veterans disability benefits] [*Mansell*]; [and]
>
> . . . .
>
> (E) *in the case of a member entitled to retired pay under chapter 61 of [Title 10], are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired* [the present case].

10 U.S.C. Sec. 1408(a)(4)(A-E) (1982 and Supp. V) (emphasis added). In short, Section 1408(a)(4)(E) of the Former Spouses Protection Act states that the amount of physical disability pay received under Chapter 61 by a retired member is exempt from the member's "disposable retired pay."

In *Mansell*, the Supreme Court held that the amounts of retired pay which a retired member of the armed forces waives in order to receive "veterans disability benefits" under Title 38 of the Code are not "disposable retired pay" and cannot be treated by state courts as property divisible upon divorce. In the present case, Petitioner is not receiving "veterans disability benefits," but is receiving Chapter 61 "physical disability benefits" under Sec. 1201 of Title 10. These benefits, like "veterans disability benefits," are nontaxable and are not subject to division on divorce. *See Repash v. Repash*, 148 Vt. 70, 74, 528 A.2d 744, 745 (1987).

Chapter 61 "physical disability benefits" are awarded to members of the armed forces who are separated from military service because of physical disabilities and injuries received while serving on active duty. 10 U.S.C. Sec. 1201, *et seq.* (1982 and Supp. V). Members of the

armed forces who are separated for physical disability under the provisions of Section 1201 of Title 10 are entitled to monthly retirement pay. 10 U.S.C. Sec. 1401 (1982 and Supp. V). The amount of pay they receive is arrived at by using one of two formulas in Section 1401 of Title 10.

Under one of the formulas, a retiree multiplies the number of years served on active duty times 2½% (30 years × 2½% = 75%). The resulting percentage (75%) is then multiplied times the member's basic pay at retirement ($4,720.00). The result of the multiplication is the amount of the member's retirement, $3,540.00.[24]

Under the second formula, a retiree multiples his percentage of disability (70%) times his basic pay ($4,720.00) and the resulting figure ($3,304.00) is the amount of the member's 'physical disability pay." [25] Section 1401 provides that a retired member "is entitled to be paid under the applicable formula that is most favorable to him." 10 U.S.C. Sec. 1401 (1982). Since Section 104(a)(4) of the Title 26, the Internal Revenue Code, states that physical disability benefits are nontaxable, Chapter 61 retirees with high percentages of physical disability elect to use the second formula for determining how much they are to receive each month.

In sum, the Supreme Court of the United States held in *Mansell* that the intent of Congress was not to include "veterans disability benefits" as part of a member's 'disposable retired pay" for purposes of dividing property in divorce actions. For the same reasons relied on by the Court in *Mansell*, Counsel for Petitioner contends that Chapter 61 "physical disability benefits" are not to

---

[24] $4,720.00 (basic pay) × 75% (2½% times the number of years of service) = $3,540.00 (longevity pay)

[25] $4,720.00 (basic pay) × 70% (percentage of disability) = $3,305.00 (physical disability pay)

be included in a member's "disposable retired pay" for purposes of dividing property in divorce actions. Not only should "veterans disability payments" under Title 38 and "physical disability payments" under Chapter 61 be treated the same, but also the language used by Congress in Section 1408(a)(4)(E) makes clear that they both are to be excluded from a member's 'disposable retired pay." Because the issue raised in the present case is basically the same as the issue presented in *Mansell*, Counsel for Petitioner respectfully submits that the Supreme Court should grant, vacate and remand the present case to the Supreme Court of Virginia for further consideration in light of the Court's decision in *Mansell.*

II. Former Spouses Protection Act

The second reason the Court should grant, vacate, and remand in the present case is because the Supreme Court of Virginia has ignored the plain language of Section 1408(a)(4)(E) of the Former Spouses Protection Act in affirming the decision of the Court of Appeals of Virginia. As noted, the language of Section 1408(a)(4)(E) specifically provides that Chapter 61 physical disability benefits are not to be treated as part of a member's "disposable retired pay."

At the time Petition filed for divorce from Respondent on April 19, 1983, Section 1408(a)(4) provided as follows:

> "Disposable retired . . . pay" means the total monthly retired . . . pay to which a member is entitled (*other than the retired pay of a member retired for disability under chapter 61 of* [*Title 10*]) less amounts which . . .

Former Spouses Protection Act, Pub. L. No. 97-252, 96 Stat. 730-31 (1982).

In the trial court Petitioner argued that, under this version of Section 1408(a)(4), none of Petitioner's re-

tirement benefits were subject to division under the Former Spouses Protection Act because the language of the statute specifically excludes retirement pay received for disability under Chapter 61 from the definition of 'disposable retired . . . pay." [26]

In 1986, Congress amended Section 1408(a)(4) of the Former Spouses Protection Act by changing the definition of "disposable retired . . . pay" and by adding new language to Subsection E:

> (4) "Disposable retired . . . pay" means the total monthly retired pay . . . to which a member is entitled *less amounts which*—
>
> . . . .
>
> (E) In the case of a member entitled to retired pay under Chapter 61 of the title, *are equal to the amount of retired pay of the member* under that chapter, computed *using the percentage of the member's disability on the date when the member was retired* (or the date on which the member's name was placed on the temporary disability retirement list);

1987 Department of Defense Authorization Act, Pub. L. No. 99-661, div. A, title VI, § 644(a), 100 Stat. 3887 (November 14, 1986) (emphasis added). The significance of the amendments made to the Former Spouses Protection Act in 1986 is that Congress specifically changed the law as to how physical disability payments received by retired members under Chapter 61 of Title 10 are to be treated under the Former Spouses Protection Act.

Under the old provision, retirement pay awarded under Chapter 61 was totally exempt from coverage by the Former Spouses Protection Act. In 1986, Congress

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[26] "For court orders issued on or before November 14, 1986 . . . disposable retired [pay] does not include retired pay of a member retired for disability under 10 U.S.C. Chap. 61" 32 C.F.R. Ch. 1, § 63.6(e)(2) (July 1, 1988).

amended Section 1408(a)(4) to provide that " 'disposable retired . . . pay' means the total monthly retired pay . . . to which a member is entitled to receive . . . *less amounts which* . . . (E) . . . are equal to the amount of retired pay of the member under [Chapter 61] computed using the percentage of the member's disability on the date when the member was retired." 10 U.S.C. Section 1408 (a)(4)(A-E) (1982 and Supp. V) (emphasis added). By making this change to the Former Spouses Protection Act, Congress clearly expressed its intent to treat "physical disability pay" received by retirees under Chapter 61 in the same way it treats "veterans disability benefits" under the Act. The 1986 Amendment to the Former Spouses Protection Act, in other words, made clear that Chapter 61 physical disability benefits are not to be included in "disposable retired pay" for purposes of dividing property on divorce.

This is confirmed by provisions in the Code of Federal Regulations which define military retired pay as follows:

> *Retired pay* . . . [is t]he gross entitlement due a member based on conditions of the retirement law, pay grade, years of service for basic pay, years of service for percentage multiplier, if applicable, and date of retirement. . .

32 CFR Ch. 1, Sec. 63.3(o) (July 1, 1988). Section 63.6(e)(2)(vi) further states that among the *authorized deductions from "disposable retired pay" are*:

> (vi) *The amount of retired pay of the member under 10 U.S.C. Chapter 61* computed *using the percentage of the members's disability* [*pay*] *on the date, when the member was retired* . . . for court orders issued after November 14, 1986.

32 C.F.R. Ch 1, Sec.63.6(e)(2)(vi) (July 1, 1988). The final trial court decision in Petitioner's case was issued on December 1, 1986, just two weeks after the effective date of the amendment.

The language of Section 1408(a)(4) of the Former Spouses Protection Act and the provisions of the Code of Federal Regulations governing the distribution of disability and retired pay clearly indicate that physical disability payments under Chapter 61 are not to be included in "disposable retired pay" for purposes of dividing property in divorce actions.

In Petitioner's case, the trial court was aware of the provisions of the Former Spouses Protection Act which Petitioner had submitted to it as evidence early in the case. Indeed, the trial court had the provisions of the Former Spouses Protection Act in its possession during the year and half it had the case before it issued its March 28, 1985 opinion. Thus, the trial court was aware of the provisions of the Former Spouses Protection Act governing 'disposable retired pay" long before it issued its March 28, 1985 opinion. In addition, the trial court was aware that Petitioner's taxable retired income from the Air Force was only $236.00 per month.

The trial court stated, however, that Petitioner is to blame, and not the court, for the court's failure to decide the matters before it in accordance with the provisions of the Former Spouses Protection Act. It is the contention of Counsel for the Petitioner that the trial court is the sole source of the law in such cases and that it is the court's responsibility to comply with the provisions of the federal statute, in particular where the law is clear, where special calculations are called for, and where the parties' interpretation of federal laws may be in error.

In short, federal laws must be applied uniformly throughout the nation and it is no excuse for a court to argue that it is bound by a party's particular interpretation of federal law. In the present case, not only is the federal law clear about what amounts are to be excluded from "disposable retired pay," but federal law also is clear about how such amounts are to be calculated. By using the "wrong amount" of Petitioner's "disposable re-

tired pay" rather than the "right amount" of Petitioner's "disposable retired pay," the trial court issued a decision which is contrary to federal law and which must be reversed.

For this reason, Counsel for Petitioner respectfully requests that the Supreme Court of the United States grant, vacate and remand the issue in the present case to the Supreme Court of Virginia for further consideration in light of the Court's decision in *Mansell.*

III. Internal Revenue Code

The third reason for the Supreme Court to grant, vacate, and remand in the present case is because the decision of the Supreme Court of Virginia also ignores the provisions of Section 104(a)(4) of the Internal Revenue Code. 26 U.S.C. Sec. 104(a)(4) (1982).

Section 104(a)(4) of the Internal Revenue Code provides that physical disability pay is to be excluded from a retired member's "gross income as 'amounts received . . . for personal injuries.'" *Griggs v. Griggs*, 148 Idaho 123, 128, 686 P.2d 68, 73 (1984). In short, Section 104(a)(4) provides that the total amount of physical disability pay a retired member receives under Chapter 61 is exempt from federal income tax. This is an important tax advantage which Congress has provided to retired service members who have been disabled in the line of duty. It is the total amount of the disability awarded to a disabled retiree which is excluded from taxation and it is a matter over which the retired member has no control or election.

In the present case, the trial court disregarded the fact that the physical disability payments Petitioner received under Chapter 61 are nontaxable. By using $1,043.00 instead of $216.00 as the amount of Petitioner's "disposable retired pay" and awarding 40% of the $1,043.00 amount to Respondent, the trial court changed

more than $800.00 per month of Petitioner's nontaxable disability pay into taxable retirement pay and made it divisible on divorce. By reclassifying approximately $800.00 of Petitioner's "disability pay" per month as retirement pay, the trial court in effect "transfer[red] the tax advantage intended for the 'disability pay' to retirement pay." *Id.* at 128, 686 P.2d at 73. In other words, the trial court either transferred part of the tax advantage to Respondent, or decided that $800.00 per month of Petitioner's disability pay should be treated as taxable income for purposes of the divorce action.

It is doubtful Congress intended for the states to take a portion of a retiree's nontaxable income and treat it as taxable income for purposes of dividing property in divorce actions. But that is what the trial court did in the present case, and both the Court of Appeals of Virginia and the Supreme Court of Virginia affirmed the trial court's actions in this regard.

As in matters concerning the raising and supporting of the armed forces, the operation and application of the Internal Revenue Code is a matter of importance to the federal government. The laws of the nation concerning such matters are federal in nature and must be the supreme law of the land. Not only are these areas of special concern to the federal government, but also they are areas where uniformity of application throughout the nation is important. In these areas, federal law must be supreme.

For the reasons stated, Counsel for Petitioner respectfully submits that the Supreme Court of the United States should grant, vacate, and remand the present case to the Supreme Court of Virginia for further consideration in light of the Supreme Court's decision in *Mansell v. Mansell*, —— U.S. —— (No. 87-201, May 30, 1989).

CONCLUSION

Counsel for Petitioner respectfully requests that the Supreme Court of the United States grant, vacate, and remand the decision of the Supreme Court of Virginia in the present case (1) because the decision of the Supreme Court of Virginia is in conflict with the Supreme Court of the United States' recent decision in *Mansell v. Mansell*, —— U.S. —— (No. 87-201, May 30, 1989); (2) because the decision of the Supreme Court of Virginia ignores the "plain and precise" language of Section 1408 (a)(4)(E) of the Former Spouses Protection Act; and (3) because the decision of the Supreme Court of Virginia ignores the language of Section 104(a)(4) of the Internal Revenue Code which provides that Petitioner's nontaxable disability benefits are not to be reclassified and treated as taxable income for purposes of dividing property in a state divorce action.

Respectfully submitted,

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APPENDICES

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APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 26th day of April, 1989.

Record No. 890059
Court of Appeals No. 1449-86-4

ELWIN F. HOLMES,
Appellant,

against

FRANCES SUE POE HOLMES,
Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach
Clerk

By: /s/ Illegible
Deputy Clerk

APPENDIX B

COURT OF APPEALS OF VIRGINIA

Present: Judges Barrow, Benton and Cole
Argued at Alexandria, Virginia

Record No. 1449-86-4

ELVIN F. HOLMES

v.

FRANCES SUE POE HOLMES

From the Circuit Court of Frederick County
Robert K. Woltz, Judge

OPINION BY
JUDGE JAMES W. BENTON, JR.

December 20, 1988

Thomas B. Throckmorton (Scully, Throckmorton & Glass, on briefs), for appellant.

John E. Wetsel, Jr. (Kuykendall, Wetsel & Kuykendall, P.C., on brief), for appellee.

Elwin F. Holmes was granted a divorce *a vinculo matrimonii* from his wife, Frances Sue Poe Holmes, on the statutory no-fault ground. The husband contends that the trial judge erred in determining the amounts of the

monetary award and spousal support award, and he raises the following issues in this appeal: (1) whether military pensions are property subject to distribution by monetary award; (2) whether the trial judge erred in failing to reduce the gross estimated value of the husband's military pension to its present value; (3) whether the trial judge abused his discretion by refusing to grant a petition for a rehearing based on the allegation of a material mistake of fact apparent on the face of the record; (4) whether the trial judge erred by failing to consider the monetary award to the wife as income for the purpose of determining the wife's spousal support award; (5) whether spousal support award constituted an abuse of discretion; (6) whether the trial judge erred by awarding monthly spousal support and monetary award payments to the wife that exceed the husband's monthly non-disability income; (7) whether the trial judge erred in determining that the bank accounts were marital property subject to distribution by monetary award; and (8) whether the trial judge erred in reserving the right to reopen the suit in the event of the husband's death. For the reasons that follow we affirm the judgment.

I

The parties were married in 1942. They reared four children, all of whom were emancipated at the time of the divorce proceedings. After serving twenty-nine years with the Air Force, the husband retired as a colonel with a seventy percent disability rating.

Upon entry of the decree granting the husband a no-fault divorce, the trial judge awarded the wife $531 per month temporary spousal support. The trial judge also continued to a later date matters of distribution of property by monetary award and permanent spousal support, and he appointed a commissioner in chancery to take evidence concerning the classification and valuation of the property owned by the parties. The commissioner in chancery found that, with the exception of insignificant

tangible personal property belonging to the wife, all other property was marital property. The wife filed no exceptions to the commissioner's report.

In his March 28, 1985, letter opinion, the trial judge noted that the commissioner in chancery erred in failing to classify and value the husband's military pension. The judge found that the husband's retirement benefits were a marital asset and that at the time of the divorce the husband was receiving retirement benefits totalling $3540 per month. The husband's evidence established that of this sum, $1,062 was retired pay and $2,478 was disability pay. The trial judge deducted the husband's monthly government life insurance premium from $1,062 and determined the husband's disposable pay to be $1,043. The judge then multiplied the amount of the husband's annual disposable pay by a factor found in Code § 55.269.1 (the statutory annuity table), and determined the present value of the husband's disposable retired pay benefits to be $96,598.

The trial judge confirmed the commissioner's classification of the other marital properties and assessed their values as follows:

(1) Tangible personalty	$19,387
(2) Intangible personalty (exclusive of retirement pay)	$39,426
(3) Real estate	$68,000

The trial judge awarded the wife a monetary award of $98,103, a sum equal to fifty percent of the value of tangible personalty and real estate and forty percent of the value of intangible personalty and the husband's military retirement pay.

In considering the factors enumerated in Code § 20-107.3(E), the judge noted that while the husband had made nearly all monetary contributions to the marriage, the wife had made significant non-monetary contributions

by performing the duties of homemaker, mother, and military officer's wife. The judge also found that the duration of the marriage was over forty-one years and that the evidence did not indicate one party was more culpable than the other in the demise of the marital relationship.

The trial judge also awarded the wife $1,000 per month spousal support, finding that this amount would not place undue hardship on the husband and would allow both parties to live in a manner similar to that to which they were accustomed during the marriage.[1] In addition

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[1] The trial judge's opinion assessed the income of the parties before and after spousal support as follows:

		Monthly	Annually
(A) Husband's Income			
(1) Gross retired pay		$1,062.00	$12,744.00
(a) Less monthly monetary award		417.00	5,004.00
(b) Net retired pay		645.00	7,740.00
(2) Disability retired pay		2,478.00	29,736.00
(3) Social Security disability benefit		576.00	6,912.00
(4) Total non-investment income before spousal support		3,699.00	44,388.00
(5) Spousal support		1,000.00	12,000.00
(6) Income after payment spousal support		$2,699.00	$32,388.00
(B) Wife's Income			
(1) Social Security		$ 226.00	$ 2,712.00
(2) Investment income			
(a) Presently invested	$10,000.00		
(b) Monthly monetary award for one year	5,000.00		
(c) Cash monetary award payable by 12/1/85	15,000.00		

[Continued]

to the factors considered in the determination of the monetary award, the trial judge considered the following factors in making the spousal support award: the wife's limited opportunity to secure further education and training at age sixty-four; the husband's superior resources; the husband's annual tax-free disability retired pay of $29,736; the tax benefit of the deductibility of the husband's spousal support payments from his gross income; the inclusion of support payments in the wife's gross taxable income; the wife's continued eligibility for military health and commissary benefits; the wife's $383.50 per month mortgage on a home purchased subsequent to the divorce; and the husband's ownership of a home not subject to a mortgage.[2]

The husband filed exceptions to the judge's ruling, contending that since he was retired for disability reasons, his entire retirement pay was not "disposable" under 10 U.S.C. § 1408(a)(4) and therefore was not available for distribution by monetary award. The husband took further exception to basing a monetary award upon the value of retirement benefits he had not actually received. In addition, the husband filed a motion for a stay of execution of the court's order directing him to

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[1] [Continued]

		Monthly	Annually
(d) Total investment funds	$30,000.00 at 8%	200.00	2,400.00
(3) Total income without spousal support		426.00	5,122.00
(4) Spousal support		1,000.00	12,000.00
(5) Total income		$1,426.00	$17,122.00

[2] The husband does not raise as an issue (and we, therefore, do not address) whether the trial judge erred by including the balance of the husband's net retirement pay after the deduction of the monthly monetary award in determining his income for purposes of awarding spousal support.

pay the monetary award, and he also alleged that the award improperly invaded savings accounts derived from disability income.

Pursuant to the husband's exception, the judge deferred the portion of the monetary award based on military retired pay pending his consideration of the status of military retirement pay; however, the judge denied the motion for a stay of execution. After considering the parties' memoranda and oral arguments and refusing a second motion for a stay of execution, the judge issued a supplementary letter opinion holding that the husband's trial testimony, affidavit, and memorandum, which stated that thirty percent of his military retirement pay was disposable, amounted to an admission that bound the husband to that position and prevented him from introducing contrary evidence.

Alleging that a material mistake of fact had been made in the method of computing his disposable retirement pay, the husband requested a rehearing. After hearing argument on the petition, the judge issued a second supplemental letter opinion denying the petition to rehear, stating that although no final decree had been entered, the findings and rulings contained in the earlier opinion were comparable to a jury verdict and that he considered the nature of the husband's petition to be a bill of review. The judge further stated that a rehearing at that time would in essence be the granting of a new trial and that since the evidence which the husband wished to introduce was readily available at the time of the commencement of the litigation there was no basis on which to receive additional evidence.

II

The husband contends that his military pension is not subject to distribution by monetary award because it is not property but merely an expectation of income. This Court addressed that precise issue in *Sawyer v. Sawyer*, 1 Va. App. 75, 335 S.E.2d 277 (1985), and held:

> We agree that pensions do not have the normal attributes of assets as such but they are property rights. Mr. Sawyer can enforce his right to his pension in the courts of the United States. Code § 20-107.3(E)(8) specifically requires the Chancellor to consider the present value of pensions and retirement benefits in deciding upon an equitable distribution award. This reference alone does not necessarily lead to the conclusion that a pension or retirement benefit is marital property; however, the legislature made clear its intent by providing in Code § 20-107.3 (G) that "[n]o part of any monetary award based upon the value of pension or retirement benefits, whether vested or nonvested, shall become effective until the party against whom such award is made actually begins to receive such benefits." Our reading of the statute leads us to conclude that the legislature intended all pensions, including military pensions, to be personal property and subject to equitable distribution.

Id. at 78, 335 S.E.2d at 279-80. For the reasons stated in *Sawyer*, we hold that the trial judge properly found that a military pension is property subject to distribution by monetary award.

III

The husband next contends that the trial judge erred in failing to discount the gross amount of his military pension to arrive at a present value of his pension. The husband asserts that the judge multiplied his annual disposable retired pay, $12,516, by 7.718 years, which the husband alleges to be his life expectancy, to arrive at $96,598 as a value of his pension. The husband then asserts that the trial judge should have discounted that amount by some factor, which the husband does not disclose, to determine its present value. "Code § 20-107.3 (E)(8) specifically requires the trial court to consider

the *present value* of pensions and retirement benefits in deciding upon the amount of a monetary award." *Brinkley v. Brinkley*, 5 Va. App. 132, 138, 361 S.E.2d 139, 141-42 (1987) (emphasis in original). Contrary to the husband's contention, the husband's statutory life expectancy at his age of 64 is 15.9 years. *See* Code § 8.01-419. The annuity table in Code § 55-269.1 that the judge used to determine the present value of the disposable portion of the husband's military pension is not merely a quantification of the husband's life expectancy but is a method by which a present value is determined. *See* Code §§ 55-269.1, 55-270, and 55-271. Therefore, we find the husband's contention that the judge erred in calculating the present value of the husband's pension is without merit.

IV

The husband's further contends that a material mistake of fact is apparent on the record and that the trial judge erred in failing to grant a rehearing. The husband argues that the denial of his petition arose from the judge's incorrect assumption that the husband's petition was of the nature of a bill of review instead of that of a petition for a rehearing. We agree with the husband's characterization of the nature of his petition as a petition for a rehearing. *Hutcheson v. Savings Bank*, 129 Va. 281, 296, 105 S.E. 677, 682 (1921); *see also Royall v. Peters*, 180 Va. 178, 187, 21 S.E.2d 782, 786 (1942). A bill of review only lies to a final decree. *Downing v. Huston, Parbee Co.*, 149 Va. 1, 8-9, 141 S.E. 134, 136-37 (1927). We do not agree, however, that the trial judge abused his discretion in dismissing the petition.

After a court has concluded an evidentiary hearing "during which each party had ample opportunity to present evidence, it [is] within the court's discretion to refuse to take further evidence on this subject." *Morris v. Morris*, 3 Va. App. 303, 307, 349 S.E.2d 661, 663 (1986). In order to demonstrate an entitlement to a

rehearing, a petitioner must show either an "error on the face of the record, or . . . some legal excuse for his failure to present his full defense at or before the time of entry of the decree." *Downing*, 149 Va. at 9, 141 S.E. at 136-37; *see also Baker v. Watts*, 101 Va. 702, 706, 44 S.E. 929, 930 (1903). Although the trial judge's letter ruling did not specifically address the issue whether there was an error on the face of the record, its ruling implies a finding that there was no such error. We agree.

Specifically, the husband alleges that the record demonstrates that his monthly disposable retirement income subject to equitable distribution, if any, is $217 rather than the $1,043 figure which he presented in evidence. When the husband retired from the military, he was seventy percent disabled. In arriving at the amount of $1043 monthly disposable retirement pay, the judge multiplied the husband's total monthly income of $3,540 by seventy percent to arrive at a figure of $2,478. He then subtracted this amount (the amount determined to be disability pay) from the $3,540 to arrive at $1,062. He then further reduced this amount by $19, the monthly life insurance premium, to arrive at the amount of $1,043 disposable retirement pay subject to equitable distribution. The husband alleges that this method of determining his disposable retirement pay was incorrect because his disability income should have been determined by multiplying his base pay of $4,720 by seventy percent instead of his total retirement pay by seventy percent. Such revaluation would result in a figure of $217 monthly disposable retirement pay instead of $1,043 because the calculation would be: the total monthly pay ($3,540 less disability pay ($3,304) less insurance ($19) equals disposable retirement pay ($217). The husband contends that this error in computation of the amount of disposable retirement pay is apparent on the record because (1) an exhibit shows his taxable income to be $236 monthly and (2) the federal statute titled "Computation of Retired Pay" states that the percentage

of disability will be taken against base pay to arrive at the amount of disability.[3]

The trial judge's ruling, however, does not constitute an error on its face because 10 U.S.C. § 1401 merely provides the basis to calculate the total retirement pay and does not designate the amounts of pay allotted to disability pay versus non-disability pay. Although the record indicates that the husband's monthly taxable income is $236, this evidence alone does not necessitate a finding that an error in the method of determining the amount of disposable retirement was made.

Moreover, since the husband's second proposed method of computation was available at the beginning of the proceedings, he has no ground upon which to contend that he should have been granted a rehearing on the basis of after-discovered evidence. *Baker*, 101 Va. at 706, 44 S.E. at 930. Prior to the filing of his memorandum in March of 1986, almost one year after the judge had written an extensive opinion resolving monetary award and support issues, the husband had never raised objection to the use of his total retirement pay as a base figure from which to compute the amount of his disability income. Furthermore, the judge derived his finding concerning disposable retirement income from the husband's testimony and affidavit that his disposable retirement income was in fact $1,042 per month.

---

[3] 10 USC § 1401 states that in order to compute the amount of retired pay for a person retired under § 1201, the member should take his "[m]onthly basic pay of grade to which member is entitled under section 1372 or to which he was entitled on day before retirement or placement on temporary disability retired list, whichever is higher" and multiply that amount by "[a]s member elects—(1) 2½& of years of service credited to him under section 1208; or (2) the percentage of disability on date when retired," and then subtract from that amount the "[e]xcess over 75% of pay upon which computations is based."

After the court issued its first detailed letter opinion in March, 1985, the husband argued exceptions on several other grounds at numerous *ore tenus* hearings. When the judge denied the husband's petition for a rehearing, the case had been pending for over three years. As the trial judge stated in its third detailed letter opinion, "enough is enough."

> Courts are provided for the purpose of putting an end, and a speedy end, to controversies, and not as a forum for endless litigation. Without valid excuse, no party who has had his day in court can reopen the hearing after final decision of extrinsic matters in controversy between the same parties on the mere ground that he wishes to interpose other defenses which he neglected to interpose before such decision was made. It is seldom that such defenses have any real merit, and where it chances that they have any validity, it is better that they should be lost by the negligent litigant than the vitally important rule that there must be an end of litigation should be set at naught.

Gills v. Gills, 126 Va. 526, 546, 101 S.E. 900, 906 (1920). "[A]s the petition to rehear did not allege the discovery of new and important [evidence] not known or accessible to petitioner before the former hearing and pointed out no error upon the face of the [record], it was properly dismissed." *Woods v. Early*, 95 Va. 307, 311, 28 S.E. 374, 375 (1897).

V

The husband next argues that the trial judge erred in failing to consider the $417 per month monetary award payment from his military pension as income when determining the wife's spousal support award. In determining the amount of support and maintenance for a spouse, the judge must consider, among other factors, the intangible property interests of the parties, the financial

recources of the parties, and the provisions made with regard to the marital property under Code § 20-107.3.[4] Thus, the judge was mandated by statute to consider the monthly $417 sum. The record, however, discloses that the judge did consider the $417 per month payment attributable to the pension when determining his spousal support award. In his opinion, the judge stated that he considered the financial resources of the parties. Furthermore, when computing the wife's income, the judge factored in an annual eight percent yield on the sums awarded to the wife by monetary award. We find that the trial judge complied with the dictates of Code § 20-107.1 when making the spousal support award.

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[4] Code § 20-107.1 states in pertinent part:

The court, in determining support and maintenance for a spouse, shall consider the following:

1. The earning capacity, obligations, needs and financial resources of the parties, including but not limited to income from pension, profit sharing or retirement plans;
2. The education and training of the parties and the ability and opportunity of the parties to secure such education and training;
3. The standard of living established during the marriage;
4. The duration of the marriage;
5. The age and physical and mental condition of the parties;
6. The contributions, monetary and nonmonetary, of each party to the well-being of the family;
7. The property interests of the parties, both real and personal, tangible and intangible;
8. The provisions made with regard to the marital property under § 20-107.3; and
9. Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

VI

The husband additionally argues that the permanent spousal support award was not supported by the evidence because the judge (1) failed to specifically address factors listed in Code § 20-107.1, and (2), without taking any new evidence, increased the prior temporary support award by fifty percent when making the permanent support award.

"In determining spousal support, a trial court has broad discretion and 'the appellate court will not interfere with such discretion, unless it is clear that some injustice has been done.'" *Morris v. Morris*, 3 Va. App. 303, 309, 349 S.E.2d 661, 664 (1986) (quoting *Oliver v. Oliver*, 202 Va. 268, 272, 117 S.E.2d 59, 62 (1960)). In exercising discretion, however, the judge must consider the factors enumerated in Code § 20-107.1. *Bristow v. Bristow*, 221 Va. 1, 3, 267 S.E.2d 89, 90 (1980). We find ample evidence in the record that the judge considered all the factors enumerated in Code § 20-107.1.

The judge noted that, although the husband made nearly all the monetary contributions during the parties' forty-one-year marriage, the wife had made significant non-monetary contributions in raising the parties' four children and in assisting the husband in his career. The judge further noted that both parties were mentally alert, that the husband, though suffering from hypertension, was not limited more than any other person his age, and that the wife was in good health for her age. The judge stated that since both parties were in their mid-sixties their opportunities to secure education and training were largely academic.

In assessing the parties' financial resources, the judge found that the husband's resources were vastly superior to those of the wife. The husband owned a home mortgage free and received $29,736 annual disability benefits tax free. The wife, on the other hand, owned a home

subject to a $383 per month mortgage. In considering the tax consequences, the judge noted that the husband was allowed to deduct his support payments from his gross income, and that the support payments were includable in the wife's gross income. The judge stated that, after spousal support payments, the husband's approximate annual income is over $32,000 and the wife's annual income, including investment income from her equitable distribution award and her support payments, is slightly over $17,000. After consideration of all these factors, the judge ordered the husband to pay $1,000 per month spousal support, stating that this sum would not put undue hardship on the husband and would afford both parties the opportunity to live in a life style similar to that enjoyed by them during the marriage. The facts clearly support the trial judge's determination that the amount of the spousal support award will not place undue hardship on the husband and that the award will meet the financial needs of the wife.

That the amount of the permanent award was a substantial increase over the amount of the temporary award is of no consequence. The amount of temporary support is not a factor under Code § 20-107.1 that the judge must consider when determining the appropriate amount of spousal support. Accordingly, we conclude that the trial judge gave due consideration to the factors enumerated in Code § 20-107.1 and did not abuse his discretion. *Collier v. Collier*, 2 Va. App. 125, 129, 341 S.E.2d 827, 829 (1986); *Thomasson v. Thomasson*, 225 Va. 394, 398, 302 S.E.2d 63, 66 (1983).

VII

The husband next argues that the trial judge erred in ordering $1,000 monthly spousal support because the monthly spousal support and equitable distribution payments exceeded his monthly non-disability income of $1,062. The husband contends that since the amounts of the awards necessitate an invasion of his disability

funds, the judge is in essence ordering him to pay from funds that have exempt status. We find no merit in this argument.

The judge did not specify that the payments had to come from the husband's excluded disability benefits. Contrary to the husband's contention, the source of the payments need not come from his exempt disability pay; the husband is free to satisfy his obligations to his former wife by using other available assets. Furthermore, we conclude that the husband's military disability benefits could properly be considered in determining the amount of spousal support awarded to the wife. *See Parker v. Parker*, 335 Pa. Super. 348, 350-54, 484 A.2d 168, 169-79 (1984); *Mims v. Mims*, 442 So. 2d 102, 103-04 (Ala. Ct. App. 1983); *see also Rose v. Rose*, —— U.S. ——, 107 S. Ct. 2029 (1987) (veterans' disability benefits may be used for the support of veterans' dependents).

VIII

The husband further contends that the trial judge erred in considering the funds in his bank accounts as marital property subject to distribution by monetary award because those funds consisted almost entirely of exempted retired disability pay. He cites *Pfeil v. Pfeil*, 115 Wis. 2d 502, 341 N.W.2d 699 (1983), as authority for the proposition that exempt disability income retains its exempt status after it is banked and received. The husband further asserts commingling of exempt disability funds with marital funds has no effect on the exempt status of the disability funds because 38 U.S.C. § 310, concerning military disability benefits paid by the Veterans Administration, and 10 U.S.C. § 1408, concerning military disability payments, state no requirement that these exempt payments be maintained separately and distinctly from other assets. We find it unnecessary to address the husband's arguments that certain exempt disability funds retain their exempt status after being deposited in accounts and that these funds need not be maintained separately and distinctly from marital funds

because we conclude that the husband did not carry his burden in establishing that the sources of his bank account funds were his disability pay.

Code § 20-107.3(A)(2) creates a rebuttable presumption that property acquired during the marriage is marital property. Code § 20-107.3(A)(2); *see also Lambert v. Lambert*, 6 Va. App. 94, 99, 367 S.E.2d 184, 187 (1988); *Brown v. Brown*, 5 Va. App. 238, 242, 361 S.E.2d 364, 366 (1987); *Rexrode v. Rexrode*, 1 Va. App. 385, 392, 339 S.E.2d 544, 548 (1986). Beyond the husband's bald assertions in a memorandum and a motion that the sources of the bank accounts were disability payments, there is no evidence in the record establishing the sources of these funds. "The burden is always on the parties to present sufficient evidence to provide the basis on which a proper determination can be made." *Hodges v. Hodges*, 2 Va. App. 508, 517, 347 S.E.2d 134, 139 (1986). Because the husband did not present sufficient evidence that the sources of his accounts were exempt property, we find no error in the trial judge's classification of these accounts as marital property subject to distribution by monetary award.

IX

The husband's final argument is that the judge erred in reserving the right to reopen the suit at the event of his death. In the final decree, the judge ordered the husband to pay the portion of the award attributable to the pension in two lump sums and the remainder in monthly payments of $417. The judge further stated that "[t]o the extent that a balance remains to be paid at the death of either party, then this suit shall be subject to reopening to determine questions presented at that time." The husband contends that this reservation of power to reopen the case is error because *McLaughlin v. McLaughlin*, 2 Va. App. 463, 472, 346 S.E.2d 535, 540 (1986), precludes the charging of a pension award

against his estate in the event of his death prior to the payment of the total award.

We believe, however, that a ruling from this Court ordering the trial judge to excise that portion of its decree reserving power to reopen the case would be premature. The decree reserved the power to reopen the suit at *either* party's death. It is possible that the wife will die before the husband and the judge will reopen the suit at that time to relieve the husband from making further payments to her estate. It also is possible that the husband will die before the wife and the court will at that time render an order consistent with our holding in *McLaughlin*. The following statement in *Morris v. Morris*, 3 Va. App. 303, 305, 349 S.E.2d 661, 663 (1986), is appropriate to this issue:

> [A] trial court has the power to reserve in a decree of divorce the authority to make a monetary award under Code § 20-107.3. *Parra v. Parra*, 1 Va. App. 118, 127, 336 S.E.2d 157, 162 (1985). This holding is consistent with the long held principle that a court of chancery need not fully exercise its power at one time but may adapt its relief to the circumstances of a particular case. *Brinn v. Brinn*, 147 Va. 277, 285, 137 S.E. 503, 505 (1927). The trial court's decision was also consistent with its authority to reserve consideration of support questions beyond the time of the final decree. *Thomasson v. Thomasson*, 225 Va. 394, 397 n.1, 302 S.E.2d 63, 65 n.1 (1983). Therefore, we find no error in the trial court's exercise of this authority.

For all the reasons stated, the judgment below is affirmed.

Affirmed.

APPENDIX C

VIRGINIA:

IN THE CIRCUIT COURT OF FREDERICK COUNTY

Chancery No. 7108

ELWIN F. HOLMES,
Complainant

v.

FRANCES SUE POE HOLMES,
Defendant

Chancery No. 7119

FRANCES SUE POE HOLMES,
Complainant

v.

ELWIN F. HOLMES,
Defendant

FINAL DECREE

This case came before the Court on March 26, May 28 and July 30, 1986, for entry of a Final Decree, on motion of the Wife's attorney for additional attorney's fees, and on the Husband's motions to reopen the case to allow further evidence and to re-hear on the basis of a material mistake of fact.

The Husband appeared by his counsel, and the Wife appeared by her counsel. Argument was heard, and in consideration whereof, and in acordance with the Court's letter opinion of March 28, 1985, and supplemented by

its letter opinions of December 17, 1985 and July 8, 1986, it is ADJUSTED and DECREED as follows:

1. Husband's motions to reopen the case to present further evidence and to re-hear on the basis of a material mistake of fact are denied.

2. Considering all of the factors enumerated in Virginia Code Section 20-107.1, Elwin F. Holmes is ORDERED to pay spousal support to Frances Sue Poe Holmes in the amount of One Thousand Dollars ($1,000.00) per month, payable on the first day of each month, beginning April 1, 1985, and continuing on the same day of each month thereafter until the death or remarriage of Frances Sue Poe Holmes, the death of Elwin F. Holmes, or further Decree of this Court.

3. Considering all of the factors enumerated in Virginia Code Section 20-107.3, Elwin F. Holmes is ORDERED to pay to Frances Sue Poe Holmes the following installment amounts in satisfaction of the monetary award in accordance with Schedule II of the Court's opinion of March 28, 1985:

A. The sum of $2,140.00, payable April 1, 1985, which sum has been paid.

B. The sum of $7,500.00, payable August 1, 1985, which sum was paid with interest.

C. The sum of $7,500.00, payable January 17, 1986, which sum has been paid with interest.

D. Mrs. Holmes' share of Husband's retired military pay shall be payable as follows:

1. The sum of $7,927.00, with interest at the rate of 10% from April 1, 1985, which sum has not been paid and for which judgment is hereby ENTERED against Elwin F. Holmes in the amount of $7,927.00, plus interest at the rate of 10% from April 1, 1985 until paid.

2. The sum of $6,672.00 is due to Frances Sue Poe Holmes representing Frances Sue Poe Holmes' share of the Husband's retirement benefits at the rate of $417.00 per month in the period from April 1, 1985 through July 5, 1986, for which judgment is hereby ENTERED against Elwin F. Holmes in the amount of $6,672.00, plus interest from July 5, 1986, until paid.

3. Following payment of the aforesaid two payments, Mr. Holmes shall pay to Mrs. Holmes the sum of $24,040.00 ($30,712.00—$6,672.00) in monthly payments of $417.00 per month, which shall be paid on or before the 5th day of each month, beginning August 5, 1986. To the extent that a balance remains to be paid at the date of death of either party, then this suit shall be subject to reopening to determine questions presented at that time.

E. Elwin F. Holmes shall pay to John E. Wetsel, Jr., Attorney for Frances Sue Poe Holmes, the sum of $350.00 as additional attorney's fees incurred incident to the various post-opinion matters raised by counsel for Elwin F. Holmes, on or before April 30, 1986, which amount has not been paid. Therefore, judgment is hereby ENTERED against Elwin F. Holmes in the amount of $350.00, plus interest from April 30, 1986 until paid.

4. Counsel for the Husband, Elwin F. Holmes, duly objected and excepted to all adverse rulings of the Court.

5. Upon Motion by the Husband for the Court to set a bond for the suspension of execution of those portions of this Final Decree set forth in paragraphs 3.D.1; 3.D.2.; and 3.D.3., the Court does set bond for suspension of execution of such portions of this Decree in the amount of $20,000.00, in accordance with the provisions of Section 8.01-676.1 C and F, Code of Virginia, as amended.

The following is stated pursuant to Section 20-60.3, Code of Virginia, as amended:

1. Support payments in arrears may be withheld pursuant to Section 20-79.1, from earnings as defined in Section 63.1-250, without further order of any court or having to file an application for services with the Department of Social Serviees;

2. The Social Security Number of Elwin F. Holmes is: 245-14-8945.

This Decree is a Final Decree. There being nothing further to be done in this cause, the Clerk is directed to place this cause among those ended.

ENTERED this 1st day of December, 1986.

/s/ Robert K. Woltz
Judge

I ASK FOR THIS:

/s/ John E. Wetsel
JOHN E. WETSEL, JR.,
Counsel for Frances Sue Poe Holmes

SEEN AND OBJECTED TO AS NOTED ABOVE:

/s/ Thomas B. Throckmorton
THOMAS B. THROCKMORTON,
Counsel for Elwin F. Holmes

APPENDIX D

COMMONWEALTH OF VIRGINIA

[SEAL]

TWENTY-SIXTH JUDICIAL CIRCUIT

July 8, 1986

Thomas B. Throckmorton, Esquire
Scully, Throckmorton & Glass
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Winchester, Virginia 22601

John E. Wetsel, Jr., Esquire
Kuykendall, Wetsel
& Kuykendall, P.C.
Post Office Box 2760
Winchester, Virginia 22601

Re: Holmes v. Holmes—Circuit Court of
Frederick County—Chancery Nos. 7108 and 7111

Gentlemen:

After filing detailed opinion March 28, 1985 on equitable distribution, Elwin Holmes filed motion for reconsideration and for introduction of further evidence. This was made on the basis that the equitable distribution determination concerning his military retirement pay was in error. The motion was denied for reasons set forth in letter opinion of December 17, 1985.

Even subsequent thereto he filed a memorandum May 26, 1986 again putting forward his reasons why reconsideration and additional evidence should be had. Why final decree had not been presented for entry prior to that time escapes understanding. Subsequent to filing of that memorandum Holmes obtained new counsel, who, on April 19 and April 24, 1986 filed petition to re-hear and amended petition to re-hear on which argument was had. The petition substantially re-asserts the grounds previously asserted by Holmes.

The Court has not changed its opinion and denies this facet of the petition to re-hear for the reasons stated in

the opinion. Additional explication of those rulings follows:

There must be an end to all litigation (though one may doubt that general principle in reference to this case). True, no final decree on the point has been entered but nonetheless the petitions are in the nature of a bill of review, the grounds for granting which are stated generally in 3A Michie Juris., Bills of Review § 16, wherein it is also stated that the office of that pleading is the same in chancery as is a motion for new trial at law and generally with the same requirements. The findings and rulings contained in the opinion of March 28, 1985 are comparable to a jury verdict. To grant the petition would be in effect to order a new trial on the basis of after-discovered evidence on an important aspect of equitable distribution settled by that opinion, which was based in that regard on the unequivocal assertions and theory of the petitioner.

Both at law and equity there is the requirement that granting new trial or hearing on the basis of new evidence means newly discovered evidence which was not available at the time. Clearly the evidence petitioner seeks to introduce now was available to the petitioner from the time of his filing his bill of complaint in April of 1983 and continued to be available to the time of the opinion rendered March 28, 1985. Certainly due diligence would have disclosed it. At law and by analogy in equity, "A new trial for after-discovered evidence is granted with great reluctance and with special care and caution." Burke, Pleading and Practice (4th ed.), § 324, page 601. Applications for new trials "are based on the ground that there never has been a fair trial on the merits," and rest with the sound discretion of the Court. *Id.*

Discretion is exercised in this case on the following factors:

(1) The "new" evidence petitioner seeks to introduce at a new hearing was obviously readily available at the previous hearing. It had been since the commencement of this litigation almost eighteen months before. It is this long available evidence he wishes to introduce now in substitution of his evidence given months before rendition of decision, which relied on that evidence and which decision he has found unpalatable.

(2) The case has been pending now for over three years with numerous pleadings, memoranda, *ore tenus* hearings and arguments, plus a reference to a Commissioner in Chancery. Once given a full and fair hearing on the merits both parties are entitled to have the litigation put to rest without re-opening on the basis of claims of new and additional evidence, particularly where that evidence was previously readily available.

(3) The petitioner has been quite litigious, even captious at times, and thereby has already caused substantial delays. The present petition and amended petition are but additional examples of his efforts to frustrate termination of litigation on other than his own terms. Before these last two pleadings the Court, at the expense of great time and effort, had meticulously considered the evidence and the law and rendered an extensive opinion. Subsequently, in view of the petitioner's objections to it, the Court reaffirmed the holding of that opinion by yet another written opinion. In spite of this, petitioner reasserts essentially the same ground in another effort to upset the settled ruling and re-open the point. Enough is enough, and the other party has a powerful interest in and right to finality in this case, not further delayed by relitigation.

One new point is raised in the amended petition to rehear which would open up the whole matter of equitable distribution. Petitioner filed his bill of complaint April 19, 1983 and final decree granting him divorce was en-

tered August 3, 1983. Decree of reference to the Commissioner was entered September 26, 1983 directing an accounting and valuation of marital and separate property as of the date divorce decree was granted. The Commissioner's report was filed March 30, 1984.

Petitioner now asserts that re-hearing is necessary because determination of the property of the parties should have been made as of April, 1983. This is based on the 1984 amendment to § 20-107.3 in subsection 2. The pertinent provision with the amendment emphasized is:

> All property . . . acquired by either spouse during the marriage, *before the filing of a bill of complaint stating a ground for divorce* is presumed to be marital property in the absence of satisfactory evidence that it is separate property.

Re-hearing on this ground is denied. First of all, petitioner took no exception to the decree of reference setting the date of divorce decree as the date in respect of which determinations of marital and other property should be made. Second, the report of the Commissioner made his determination with respect to marital property existing as of the date of the divorce decree and petitioner took no exception to the report in this regard. Before the statutory amendment several dates for determination of marital property were available to be chosen and the option exercised by the Court in choosing the date of divorce has in all proceedings been assented to by the petitioner until now. Finally, there is nothing in the amendment to show that it is retroactive in effect and under the circumstances it should not be retroactively applied in this case.

Counsel for Frances Holmes will as expeditiously as practical prepare decree making disposition of all remain-

ing issues in the case, which decree shall take note of all exceptions taken to it by Elwin Holmes.

Yours very truly,

/s/ Robert K. Woltz
ROBERT K. WOLTZ
Judge

h
Original to Court File

APPENDIX E

COMMONWEALTH OF VIRGINIA

[SEAL]

TWENTY-SIXTH JUDICIAL CIRCUIT

December 17, 1985
(Dictated December 16, 1985)

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John E. Wetsel, Jr., Esquire
Kuykendall, Wetsel
& Kuykendall, P.C.
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Winchester, Virginia 22601

Re: Holmes v. Holmes—Circuit Court of
Frederick County—Chancery Nos. 7108 and 7111

Gentlemen:

This letter opinion is supplemental to formal opinion of March 28, 1985 in these consolidated cases. Following filing of that opinion the former husband, Elwin Holmes, seeks to have the rulings contained in it changed. He now maintains all of his military retirement pay is disability retirement pay so as to reduce the equitable distribution monetary award provided for in Section 20-107.3 and also reduce the amount of the award for spousal support.

He filed a "Memorandum of Exceptions" to the opinion, a motion to reconsider and seeks to introduce further evidence in support of his claim as to retirement pay. He does in fact attach certain documents and makes various allegations of new facts in his memorandum supportive of his new position.

This proceeding has been long and protracted and involved a number of *ore tenus* hearings. It is apparent that the movant is now disappointed in the determinations of the Court both as to equitable distribution and spousal support. In his effort to obtain a reconsideration of the matters and hopefully thereby obtain rulings more

favorable to him, he now takes a position at great variance from that taken in the various proceedings prior to rendition of the opinion.

There was evidence to show that his total military retirement pay was $3,540 per month and that his percentage of disability retirement was 70%. Thirty percent of that amount is $1,062 which, when reduced by $19 National Service Life Insurance premium, leaves a balance of $1,043 (disregarding odd cents).

In accordance with local practice he filed with the Court an affidavit of April 26, 1984 setting forth various items of income and expense and other matters. This affidavit was submitted to be considered along with other evidence in making a determination on temporary spousal support for the wife. His affidavit included an entry "Disposable Retirement Pay" in the net amount of $1,042. He omitted from the affidavit entirely the remaining $2,478 of his retirement pay and the $19 life insurance premium. In a memorandum filed by him by counsel May 27, 1984 he states that, "Your Complainant's disposable retirement payment is $1,042 per month, one-half of which is available for support of the Defendant." At a December 12, 1984 hearing he stated that his disposable retirement income was $1,042 and in support of this filed an Air Force Retiree Annuitant Account Statement on which he had written "$1,062.03 disposable Income," noted deduction from that of $19.20 for the life insurance premium, leaving a balance of $1,042.83.

At every stage of the proceedings prior to rendition of the earlier opinion of the Court his whole theory of the case has been that this particular sum was the only portion of his total military retirement money which could be considered for equitable distribution purposes and that the remainder, or $2,478, of his total military retirement money was disability retirement and by law exempt from any consideration in effecting equitable distribution.

The wife did not dispute this. As a consequence the Court accepted it and in its opinion scrupulously excluded the $2,478 in its extensive and detailed computation of the monetary award.

In the Court's Opinion the motion for reconsideration should be denied and no new evidence should be introduced. The complainant, who was the party receiving the military retirement beenfits, held himself out as being knowledgeable concerning his retirement pay and disability retirement pay. As indicated above, he filed both an affidavit and a copy of an Air Force form in which he stated the amount available for equitable distribution; and in his name his counsel filed a memorandum to establish the same thing. Complainant's testimony and submissions were "clear and unequivocal and internally consistent." *Friend, Law of Evidence in Virginia*, Section 263. They amounted to judicial admissions which are concessions made by a party during the course of litigation which bind the party and prevent contrary evidence from being introduced." Id., Section 250.

In view of the fact that the complainant introduced evidence, made representations and advanced a theory with respect to his disposable retirement pay, and that opinion was written accepting these and was based on them in this regard the Court will not reconsider its prior opinion or admit additional evidence on the matter. For the sake of finality, expeditious disposition of cases and due regard for an opposing party the other party cannot await an opinion based on his evidence and theory of an issue and then because he is disappointed in the results obtained seek a re-hearing in order to change his theory and evidence, hopefully to achieve a different result.

The movant also claims that the award of spousal support invalidly invades his disability retirement pay. The Court merely set an amount of spousal support to be paid by him without specifying the source of that payment and

he does have sources other than the disability retirement pay from which to pay it.

He also asserts that his considerable savings are sacrosanct as a source from which no spousal support payments can be derived. Assuming without deciding that this is true, he presented no evidence to prove that these disability retirement payments were segregated in accounts pure and unadulterated by admixture of other sources of funds or income. No presumption arises that they are so segregated. This being true he is now at this late date foreclosed from opening up the case to prove this assertion.

The second $7,500 installment on monetary award which was provided for in the previous opinion was payable to the wife December 1, 1985. If he has not paid it pending decision as contained in this letter, then in order to give him opportunity to make arrangements for its payment without undue complications to his investment plans, this payment is deferred until no later than January 17, 1986, with payment of interest thereon as provided in the previous opinion of March 28, 1985.

Yours very truly,

/s/ Robert K. Woltz
ROBERT K. WOLTZ
Judge

APPENDIX F

VIRGINIA:

IN THE CIRCUIT COURT OF FREDERICK COUNTY

In Chancery No. 7108

ELWIN F. HOLMES,
Complainant

v.

FRANCES SUE POE HOLMES,
Defendant

In Chancery No. 7119

FRANCES SUE POE HOLMES,
Complainant

v.

ELWIN F. HOLMES,
Defendant

MEMORANDUM

TO THE HONORABLE ROBERT K. WOLTZ, JUDGE

This Memorandum is for the purpose of looking at the matter of military retirement benefits and Social Security Benefits, and the question of whether they can be divided, apportioned, or made subject to accessability by the Court for an award to the wife.

In *McCarty v. McCarty*, 453 U.S. 210 (1981), the United States Supreme Court, after affirming that disability retired benefits could not be assigned or distrib-

uted, ruled that non-disability military retired benefits could not be distributed upon divorce.

The Uniform Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408 was a response to the *McCarty* decision. This Act agreed with the decision as it pertains to those members who retired under the authority of Chapter 61, Title 10, U.S.C., as Colonel Holmes did. However, it did in effect overrule the decision as it pertains to non-disability retirees. The USFSPA not only agreed with the *McCarty* decision, as it pertains to Chapter 61 retirees on distribution of property upon divorce; but it expanded the decision to include alimony awards as well. This Act gave the Courts authority, subject to certain limitations, to consider *Disposable Retired Pay*. In defining *Disposable Retired Pay*, the Act specifically excludes the *retired pay* of a member retired for disability under Chapter 61, Title 10, U.S.C. Thus, this exemption from consideration by the court includes both aspects of *retired pay*, non-disability and disability benefits as received by Colonel Holmes.

The Virginia statutes pertaining to divorce (20.107.1 on maintenance and support, and 20.107.3 on distribution of property) are inconsistent with the *McCarty* decision and the USFSPA as they pertain to military retired members under Chapter 61. Therefore, any award based upon these statutes that are not in accord with these prevailing laws and decisions are illegal and cannot be accepted.

In related decisions such as *Grant v. Grant*, 9 Kan. App. 2nd 671, 685 F. 2nd 327 (1984), the Court held that military retirement pay has no present determinable value and, therefore, cannot be marital property. It would be exceedingly difficult to ascertain a lump sum present value of the benefits and to treat the benefits, like an annuity would yield on a speculative value. Moreover, the pay has none of the qualities attributal to

marital assets, such as cash surrender value, loan value, redemption value, or a value realizable after death of a beneficiary. Such payments should only be treated as income.

The Virginia statute does not address the distinction between pensions, retirement benefits, disability benefits, military retirement pay, and military disability retirement pay. The Virginia statute § 20.107.3 Subsection D.8, states that the court shall determine the award and method of payment whether the pension or retirement benefits are vested or non-vested. These terms are better fitted and probably thought of by the legislature in lay terms of business pensions and retirement benefits such as profit sharing, Individual Retirement Accounts, insurance annuities, and other such funds devised by business and the individuals, and not those created by the United States Government. A distinction is commonly made between a miiltary retirement pension and a disability pension. A disability pension is in the nature of a personal injury award and is direct recompense for the serviceman; it is therefore, not a true retirement benefit.

Further, in *Pfeil v. Pfeil*, 115 Wis. 2d 502, 341 N.W. 2d 699 (1983), where it was held that, on the basis of federal law, further military disability benefits or the present cash value of the benefits were not assets subject to distribution. A division of property which gave $20,000.00 more to the wife because the husband would receive these disability payments was, therefore, improper. 341 N.W. 2d at 701. (Citing 38 U.S.C. § 3101 (a)). This included money already *received and banked* by the husband. 341 N.W. 2d at 701. Nor could the disability benefits be considered in any aspects of the distribution, either as an offset or as any other factor: "(M)ilitary disability benefits paid or payable to a disabled veteran are not to be divided between spouses in a divorce action and are not to be made the basis for an offsetting or compensatory award to the spouse of the

disabled veteran receiving the service-connected disability award. This cannot be done, directly or indirectly, by state court or state legislation." *Id.* at 701. Accordingly, the retirement pension in this case is entirely a Chapter 61 benefit, any distribution of it or award made in consideration of it is erroneous.

Also, the award of 40% of Colonel Holmes' savings and the insurance annuities are improper since these savings are derived from his disability and exempted retirement benefits. In *Pfeil*, the husband had $18,000 in a bank account which represented disability payments paid to him prior to the divorce. The trial court had held that this was separate property because it was not commingled with assets received during the marriage. The appellate court affirmed, but articulated a rationale different from the trial court's, relying instead on the exempt nature of the payments:

> In a case involving veteran's benefits deposited in an account in a federal savings and loan association where they were subject to withdrawal on thirty day's notice, the United States Supreme Court held that "bank credits derived from veterans' benefits were within the exemption, the test being whether as so deposited the benefits remained subject to demand and use as the needs of the veteran for support and maintenance required." *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159, 161, 82 S.Ct. 1231, 1233, 8 L.Ed. 2d 407 (1962). By that test, the test of "immediate availability," the $18,000 savings account is not a marital asset subject to division, and we add only the warning that, on remand, as with future disability benefits, the $18,000 savings account is not to be given weight or consideration in reaching the appropriate division of property between these parties. The $18,000 has not been "invested;" it is "immediately available" for use by the appellant, and it is to be treated exactly as pres-

ent and future disability benefits payments are to be treated.

Colonel Holmes opened a separate savings account in his name only on April 15, 1983, before the divorce, to accumulate money to pay for the one-half (1/2) interest in the house and to facilitate any loans that would be needed. Also, his checking account was changed from a joint account in both he and his ex-wife's names to a separate account in his name only in 1980. At divorce, these two accounts contained only deposits from his exempted retired pay, social security disability benefits, and the insurance loan of $8,300.00 from a policy which premiums were payed from the exempted retired pay. Therefore, it is considered that the decision of April 12, 1985, pertaining to savings should be reversed and the $7,800.00 payment of August 1, 1985, should be ordered refunded to Colonel Holmes.

In view of the foregoing on legal restrictions to the court's considerations, the amount of monthly alimony should also be reconsidered as the court recognized in its decision of April 12, 1985. Colonel Holmes has never abrogated his responsibility to provide his ex-wife with the means to support a standard of living at the level to which she was accustomed during the marriage. This was demonstrated upon separation on March 1, 1982, when he gave $1,000.00 a month for living expenses, as well as $3,000.00 to assist in getting settled. Although the monthly amount varied, she testified in hearing with the Commissioner that she was doing fine on $950.00 per month income that she had in November, 1983.

As so stated, this level of income was providing the accustomed standard of living. Since the divorce, Mrs. Holmes has received $34,000.00 for interest in the home and $2,719.00 for her share of tangible personal property. A responsible investment of $30,000.00 in June, 1984, when received, she would be receiving over $300.00 per month in interest income now. Instead, she chose to

invest $21,500.00 in a house to live in, thus forfeiting some $215.00 per month income, and to invest $10,000.00 in certificates of deposit apparently with interest income of $80.00 to $100.00 per month. With Social Security income of $230.00 per month, this gives her a total of $330.00 per month. However, to recoup the loss of $215.00 per month income she lost by buying the house, she could readily share the house and expenses with some compatible person and receive $250.00 to $300.00 per month income. This would give her an income of over $600.00 per month. The only income of Colonel Holmes that is not exempted from the Court's consideration for alimony is the $576.00 per month of Social Security benefits. Awarding a monthly alimony payment of $500.00 from this benefit would give her a total of $1,100.00 per month income or $13,200 per year. This amount, with free medical and hospital benefits, will provide more than a modest life-style for her to which she was accustomed and which is much above the income of the average single person in the State. Such an award is considered to be within the spirit and intent of the State Code and would not be arbitrary or excessive. It certainly would provide for a standard of living that is as good or better than what she was accustomed to during marriage.

Respectfully,

ELWIN F. HOLMES

By /s/ Joseph A. Massie, Jr.
JOSEPH A. MASSIE, JR.,
Counsel

44 South Cameron Street
P. O. Box 2812
Winchester, Virginia 22601
703-667-9787

CERTIFICATE

I hereby certify that a true copy of the foregoing Memorandum was mailed or delivered to John E. Wetsel, Jr., Esquire, 208 South Loudoun Street, P. O. Box 2760, Winchester, Virginia 22601, Counsel for Frances Sue Poe Holmes. 8/20/85

APPENDIX G

VIRGINIA:

IN THE CIRCUIT COURT OF FREDERICK COUNTY

In Chancery No. 7108

ELWIN F. HOLMES,
Complainant

v.

FRANCES SUE POE HOLMES,
Respondent

In Chancery No. 7119

FRANCES SUE POE HOLMES,
Complainant

v.

ELWIN F. HOLMES,
Respondent

DECREE

This case came before the Court on July 10, 1985, for argument on the motion of Elwin F. Holmes for a stay of execution of the Court's Order of April 12, 1985, and for argument on the objection of Frances Sue Poe Holmes to Elwin F. Holmes' motion to introduce new evidence.

Counsel for Col. Elwin F. Holmes presented argument that because his client is retired under 10 USC Sec. 1201 (Chapter 61), all of his retired pay is excluded from distribution and consideration by the Court upon divorce and therefore the Court should grant the motion

for stay of execution of the Order of 12 April, 1985, wherein Col. Elwin F. Holmes is ordered to pay Seven Thousand Five Hundred Dollars ($7,500.00) on or before August 1, 1985, and the sum of Seven Thousand Five Hundred Dollars ($7,500.00) on or before December 1, 1985; in further support of Col. Elwin Holmes' motion, counsel for Col. Holmes argued that the two $7,500.00 payments must be paid from savings made up of military retired pay and social security disability benefits and therefore the Court's Order, of April 12, 1985, is contrary to law.

Counsel for Frances Sue Poe Holmes argued against the motion for stay of execution on the grounds that this Court previously ordered the payments to be made by Col. Elwin F. Holmes and even if Col. Holmes were to finally prevail regarding his legal position on the exclusion of military retired pay the Court could readjust the amount ordered to be paid by Col. Elwin F. Holmes as equity requires;

Counsel for Col. Elwin F. Holmes then presented argument regarding Frances Sue Poe Holmes objection to the admissibility of new evidence. Counsel stated that no final orders had been entered by the Court and therefore no bill of review should be required to be filed by Col. Elwin F. Holmes. Counsel argued that he needed a ruling by the Court so he could either appeal the decision of the Court or file a bill of review.

After consideration of counsel's arguments, the Court finds the Fifteen Thousand Dollars ($15,000.00) Col. Elwin F. Holmes is ordered to pay in two payments of Seven Thousand Five Hundred Dollars ($7,500.00) to his ex-wife, Frances Sue Poe Holmes, represents a cash settlement for Frances Sue Poe Holmes' just share of marital property; The fact that he allegedly will pay these sums from savings made up of military retirement pay and social security benefits notwithstanding.

The Court is considering the legal position of Col. Elwin F. Holmes and has written for a memorandum on the question of whether military person's retired under 10 U.S.C. 1201 are entitled to have their retired pay exempt from distribution upon divorce.

Upon consideration whereof, the Court did ADJUDGE and DECREE that:

1. Elwin F. Holmes' motion for a stay is denied, to which ruling of the Court counsel for Elwin F. Holmes did duly object.

2. The Court will keep under advisement Elwin F. Holmes' motion for leave to introduce new evidence, and Frances Sue Holmes' objection thereto.

ENTER this 30th day of July, 1985.

/s/ Robert K. Woltz
Judge

SEEN:

/s/ John E. Wetsel
JOHN E. WETSEL, JR.
Counsel for Frances Sue Poe Holmes

/s/ Paul H. Thompson
PAUL H. THOMSON
Co-Counsel for Elwin F. Holmes

APPENDIX H

VIRGINIA:

IN THE CIRCUIT COURT OF FREDERICK COUNTY

In Chancery Nos. 7108 and 7111

ELWIN FRANKLIN HOLMES,
Complainant

v.

FRANCES SUE POE HOLMES,
Defendant

OPINION

At issue for decision are equitable distribution, including consideration of the report of the commissioner in chancery and the exceptions to it, permanent spousal support, award of counsel fees and payment of costs.

The following is a summary of previous proceedings: Husband, for convenience hereafter Elwin, filed suit for divorce on the ground of one-year's continuous separation and less than a week later the wife, hereafter Frances, filed suit based on the same ground. The cases were consolidated and some difficulty is caused by various pleadings and other papers being placed indiscriminately in one or the other file. On hearing *ore tenus* Elwin on the ground alleged was granted divorce August 3, 1983 but the matter was continued to enable the Court to determine equitable distribution, Code Section 20-107.3, and after that determination, consideration of award of permanent spousal support prayed for by Frances. Early in proceedings she had been granted temporary support, which has been altered twice as a result of changed circumstances.

At the divorce hearing Elwin introduced evidence to show Frances' desertion and moved she be denied permanent support on the basis of Section 20-107.1. *See McClung* v. *McClung*, 206 Va. 782 (1966). This request was denied on the ground that the desertion alleged had not been proven by the preponderance of the evidence. That being true and he obtaining divorce on the no fault ground provided in Section 20-91(9)(a), she is not foreclosed from consideration for permanent support. *Mason* v. *Mason*, 209 Va. 528 (1969).

I. COMMISSIONER'S REPORT—EXCEPTIONS, AMENDATION AND SUPPLEMENTATION

(1) *Exceptions*

Considering the exceptions, after reviewing the commissioner's report and portions of the transcript of the testimony taken *ore tenus* before him, the exceptions are found to be insubstantial and are overruled. Nevertheless despite lack of exceptions to the report in other respects the Court *sua sponte* both amends and supplements the report as particularized below.

(2) *Amendations*

While the report of the commissioner does not have the weight of a jury verdict, Section 8.01-610, it is *prima facie* correct. *Raiford v. Raiford*, 193 Va. 221 (1952); Lyle, Equity Pleading & Practice, 3d ed., Section 260. A commissioner is to assist the chancellor not to supplant him and by reference to a commissioner the chancellor does not delegate his judicial function to the former. *Hoffecker* v. *Hoffecker*, 200 Va. 119 (1958). Section 8.01-610 further provides that "[t]he court shall confirm or reject such report in whole or in part according to the view which it entertains of the law and the evidence." In addition the rule concerning the weight to be given the commissioner's finding of fact is "not applicable to

pure conclusions of law contained in the report." *Hill* v. *Hill*, 227 Va. 569, 577 (1984).

The commissioner reported a total value of the marital property in the possession of Frances at $8,324.00 He then deducted $500.00 for loans owed to certain family members, which loans do not appear to be liens against any of the property. Again, the commissioner shows the marital property in the possession of Elwin at $118,489.48 but then subtracts $8,328.00 from it because of a loan Elwin made against cash surrender value of a life insurance policy. Proceeds of the loan as evidence before the Court shows were deposited in a marital property bank account.

The equitable distribution statute, Section 20-107.3, does not provide specifically for reducing the value of marital property by indebtedness. Nevertheless of the eleven factors to be considered in determining a monetary award and its payment the seventh factor provides, "The debts and liabilities of each spouse, the basis for such debts and liabilities, and the property which may serve as security for such debts and liabilities." This provision does not affect gross valuations of marital property but where an item of such property is specifically subject to a debt or liability the net value of the item is affected.

The listed debt of Frances is unsecured. The listed debt of Elwin, though secured by the life insurance policy, is not such an indebtedness as will reduce the value of marital property in his possession. At the time of his loan the cash surrender value of the insurance policy was reduced by an equal amount but his bank account was increased to the same extent. The resulting decrease and increase cancel each other out. We cannot get a second credit resulting from the loan by additionally showing it as a liability. Consequently no reduction in the value of his marital property resulted. The commissioner's report is amended by disregarding the loan of Frances and that of Elwin and restoring the amounts of these deductions

to the values of their marital property. This has been done on the attached Schedule I of marital property (in which all odd cents have been disregarded.) This Schedule also corrects the report error in showing the total value of the real estate in Elwin alone.

The commissioner's report takes no cognizance of Elwin's Air Force retirement benefits. At the time of the divorce these amounted to $3,540.00 monthly. Of this, $1,062,000 represents his retired pay and the balance, or $2,478.00, his disability retirement. Under *McCarty* v. *McCarty*, 453 U.S. 210 (1981), which arose in a community property state, armed forces retired pay was held not to be community property. Though acknowledging the power in the States generally to control the areas of divorce and of property rights of the parties upon dissolution of marriage, the Supreme Court found that the Congress by federal enactments had preempted state power with respect to military non-disability retirement pay in order to protect a substantial federal interest in the national military retirement system. The case relied strongly on *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), where a like preemption was found with respect to benefits deriving under the Railroad Retirement Act.

Congress reacted promptly and positively in 1982 by enacting the Uniformed Services Former Spouses' Protection Act, 10 USC Section 1408. The *McCarty* ruling was essentially nullified by subsection (c)(1), which provides:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, [the date of the *McCarty* decision] either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

Note that the Act does not require reitrement pay to be treated or not treated as community property or property subject to equitable distribution. On this basis at least one State has opted even after the Act not to divide military retired pay upon dissolution of marriage, *Grant* v. *Grant*, 685 P.2d 327 (Kan. App. 2d 1984); basically holding that such benefits were not "property" subject to division under the Kansas statute. To the contrary is *Griggs* v. *Griggs*, 686 P.2d 68 (Idaho 1984), holding military retired pay to be community property. One State also subsequent to the Act has elected to treat military retired pay as income to the retired serviceman and a consideration in determining alimony rather than as marital property and a consideration in making equitable distribution. *Brown* v. *Brown*, 302 S.E.2d 860 (S.C. 1983).

Virginia's equitable distribution statute, in listing the factors to determine the amount of a monetary award, specifically provides in subsection E. 8, "The present value of pension or retirement benefits, whether vested or non-vested." Subsection G further deals with pension or retirement benefits by restricting the effective date of and limiting the amount of monetary awards based on such benefits. From these provisions a clear legislative intent appears that generally pension or retirement benefits are includable as marital property at their present value. No intent appears to make distinction among private, public and military retirement benefits. By virtue of the statute, in conjunction with 10 USC Section 1408 Elwin's armed forces retired pay at its "present value" is marital property.

Even where a retirement benefit is vested and actually being paid various accounting and actuarial bases to do so are available. In view of the fact that the unforeseeable future is involved perhaps no method is perfect. The Court in *Grant*, *supra*, where the husband was already

receiving military retirement benefits, as a part of the basis for declining to declare such benefits as property subject to distribution mentioned the speculative nature of such valuations. In the present case no evidence of consequence has been presented on the point. While other methods may be available, the Court chooses in this case as being fair and appropriate the life expectancy factor statutorily approved in Section 55-269.1, thereby treating the retirement benefit as an annuity.

While Elwin's retired pay is $1,062, his monthly government life insurance premium is $19.00. The latter figure is deductible to arrive at "disposable retired or retainer pay" under subsection (a)(4)(E) of 10 USC Section 1408, resulting in a figure of $1,043.00, or $12,516.00 annually. He was sixty-four at the date of the divorce and the factor to be used under Section 55-261 is 7.718. This multiplied by the annual amount gives a present value of Elwin's retirement benefits as of the date of divorce of $96,598.00. This amount is includable in the marital property and the report of the commissioner is supplemented by this addition, giving a grand total of all marital property of $223,411.00 as appears from the attached Schedule I.

I. DISABILITY RETIREMENT BENEFITS AND EQUITABLE DISTRIBUTION

The military disability retired benefits of Elwin, as distinguished from his disposable retired pay, amounting to $2,478.00 per month, are now considered. *McCarty* dealt only with military retired, not disability, payments. It found in that instance such a strong federal interest, evidenced by congressional enactment, as to preempt this area from the vital state interests and power over family and property law. Presumably all the more would the same preemption result with respect to military disability payments. This conclusion is reinforced by the fact that

the Uniformed Services Former Spouses' Protection Act, subsection (a)(4), specifically exempts from its operation retired disability pay. Additionally the latter Act, subsection (d), provides a method whereby the former spouse may receive direct from the paying authority amounts ordered to be paid as a distributive share of retired pay, whereas disability retirement benefits under 38 USC Section 3101(a) are not subject to any sort of attachment or assignment and it preempts state community or marital property laws. In re Marriage of Hapaniewski, 438 N.E.2d 466 (Ill. App. 1982).

The preemption influence of *Hisquierdo, supra* in the context of railroad retirement benefits cannot be discounted in this regard. In other related fields, *Richard* v. *Richard*, 659 S.W.2d 746 (Tex. Ct. App. 1983), held Social Security disability benefits are not subject to state community property laws; *Ex parte Johnson*, 591 S.W.2d 453 (Tex. 1979), likewise because of federal preemption held that Veterans Administration disability benefits were not divisible upon divorce; in a community property state and in an equitable distribution state Social Security benefits have been held not subject to division or distribution upon dissolution of marriage; *In re Marriage of Cohen*, 105 Cal. App. 3d 836 (1980), and *In re Marriage of Evans*, 406 N.E.2d 916 (Ill. App. 1980). *Pfeil* v. *Pfeil*, 341 N.W.2d 699 (Wis. Ct. App. 1983), not only held that military disability benefits could not be divided or distributed between the former married partners, but citing *Hisquierdo*, that no compensating or offsetting factor in equitable distribution could be made in respect of one party receiving military disability benefits, which benefits must be disregarded in the distribution.

The conclusion then is that Elwin's military disability benefits must be excluded from the marital property of the parties and must not be used to give an indirect effect in the equitable distribution of that property. Those benefits, while they do not fit any of the three categories

of separate property mentioned in subsection A.1 of Section 20-107.3, are, as a result of federal preemption, in effect separate property or what may be termed quasi-separate property. Since the divorce Elwin on reaching age sixty-five commenced receiving Social Security disability benefits in the amount of $576.00 per month. These would be excluded if for no other reason because they did not exist at the time of the dissolution of the marriage. Section 20-107.3 A.

III. EQUITABLE DISTRIBUTION

(1) *Monetary Award—Amount*

Equitable distribution does not necessarily mean equal distribution else most of the factors mentioned in Section 20-107.3 E substantially would be surplusage. Considering those factors Elwin obviously has made nearly all the monetary contributions both to the well being of the family and in the acquisition of the marital property. Frances has made substantial non-monetary contributions to the well being of the family in bearing and rearing the four children of the marriage, of making a home for them as well as Elwin and in assisting him in his career in the ways generally incumbent on a military wife. The length of the marriage, over forty-one years at the date of dissolution and one week short of forty years at the time of separation, is of considerable significance, being substantially longer than the average modern-day marital liaison frequently terminated through apparent short-lived connubial bliss and quick divorce. Whether blissful or not the parties formed the liaison in their early twenties and it lasted nearly until they were of customary retirement age.

Frances for her age is in comparatively good health. Elwin, though suffering from hypertension, is by no means an invalid or house bound and subject to this malady the evidence does not indicate that his activities are other-

wise limited by additional physical impairments than those which would be normal to a person of his age. Both are mentally fully alert.

Obviously there were difficulties in this marriage, as there must be in any, and with the passage of years they intensified to the extent of separation and now divorce. The evidence does not indicate any particular greater degree of culpability on the part of one over the other. Elwin did, however, fail of persuasion that Frances was at fault so as to foreclose her rights to spousal support and the evidence does show that it was he who requested her to get out of the marital domicile.

There is little evidence and nothing particularly remarkable concerning the acquisition of the marital property. The tangible personalty is consistent with the accumulations of a lengthy marriage and the usual purchase of automobiles and appliances. The bulk of the intangibles derive from savings of Elwin with accumulations of interest. The jointly titled marital home was acquired after his retirement and after disposal of a previously owned home seventy or so miles distant in a metropolitan area. Frances' debt is small and more recently has been partially paid off and Elwin's sole obligation is his insurance loan, a debt only in form rather than substance.

The value of Elwin's retirement benefits has been valued above. The liquidity of the marital property is a factor related more to the manner or means of effecting equitable distribution than to the quantum of distribution. No issue has been raised by counsel regarding the tax consequences of any distribution and so it is assumed that those consequences at most would be minimal.

Among other factors is the limited opportunity of Frances to make monetary contribution to marital property due to her lack of special occupational training or experience, she having been primarily a housewife, home-

maker and mother with only part-time and occasional employment, the last being some years before the separation. Her ability to increase her estate over and above what she may receive by way of distribution appears *de minimis*. Elwin has provided comfortably for his family and there is evidence of liberality, extending even to the present toward their children. Frances' separate property is of inconsequential value. Except for his disability retirement benefits, which are to be disregarded for purposes of computing marital distribution, Elwin has no separate property.

A monetary award in satisfaction of equitable distribution is determined at $98,103.00, summarized on Schedule II attached, as follows:

(a) Tangible personalty. One-half the value of this category or $9,694.00 is awarded as a portion of the monetary award to Frances. As Frances already has $6,975.00 in value of this category in possession, in accordance with the provisions of Section 20-107.3 D approval is given to Elwin to satisfy to this extent that portion of the monetary award by formal written transfer or quit claim to Frances of the tangible personalty which was in her possession at the time of the divorce. On exercise of this option the remaining $2,219.00 will be satisfied in cash and in default of exercising the option the entire $9,694.00 will be satisfied in cash.

(b) Real estate. On decreeing divorce in pursuance of Section 20-107.3 C. the Court ordered partition of the jointly owned marital residence, the only marital real estate. One-half its value by way of monetary award is assigned to Frances. The value of the property being established at $68,000.00 Elwin promptly tendered and paid to Frances $34,000.00 at her interest in this item. Elwin therefore has satisfied the portion of the monetary award as it relates to this item of marital property. The Court is unaware whether formal conveyance has been executed and tendered by Frances in this regard.

The two foregoing categories of marital property are what might be termed of a domestic nature, being the home of the parties and those items of furniture, furnishings and vehicles accumulated and used by the parties during their marriage in conjunction with their making a home and a life together. In this case it seems both natural and equitable that the value of these items should in the form of a monetary award be shared equally.

(c) Intangible personalty (exclusive of retirement pay). This item amounts to $39,426.00, of which Frances had $1,349.00 in possession. Forty percent of the total or $15,770.00, is decreed to her in respect to this category of property in partial satisfaction of the total monetary award. The $1,349.00 she had in possession is deemed to be in partial satisfaction of this particular distribution, leaving a balance of $14,421.00 to be satisfied in cash by Elwin.

(d) Military retired pay. This items totals $96,598.00. Forty percent of this or $38,639.00 is determined to be an appropriate distribution from this item in partial satisfaction of the total monetary award. This portion of the monetary award is based upon retirement benefits presently being received and so is now effective. Section 20-107.3 G. It seems equitable that this portion of the award be paid on an accrual basis. Commencing with September, 1983 and ending with the present month $1,043.00 per month for nineteen months, or $19,817.00, has accrued to Elwin. Consequently forty percent of this, or $7,927.00, has likewise accrued to this month. This accrued sum will be payable by Elwin to Frances at the time specified below. Beginning April 1, 1985 and on the same date monthly thereafter the balance of that portion of the monetary award based on retired pay, such balance being $30,712.00, shall be paid by Elwin to Frances at the rate of $417.00 per month, being forty percent of his monthly retired pay, until the entire balance has been discharged.

The equitable distribution statute, subsection E. 8, speaks of the "present value" of retirement benefits and it is on that present value monetary award is being made to Frances. Therefore should she or he die before that portion of the present value awarded her has been paid then this suit shall be subject to reopening to determine questions presented at that time.

Awarding forty percent of retirement benefits and other intangible personalty rather than fifty percent in the case of tangible personalty and real estate seems more equitable. While Frances' agreed role as wife, mother and homemaker during this lengthy marriage was no small contribution, yet virtually all of the existing intangible marital property is directly related to Elwin's vocational endeavors away from the comforts and security of home and out in the competitive and sometimes harsh realities of the workaday world. For those reasons it appears to the Court right and just that he should retain a substantial major portion of these categories of marital property.

It also seems appropriate to the Court that the total of the monetary award be arrived at by applying for that purpose different percentages to different categories of marital property, as has been done. Nothing in Section 20-107.3 forbids it and it has been used simply as a method or device to reach an equitable result. Instead of applying varying percentages to different categories of marital properties on a reasoned basis, the Court could have made the same calculations and then merely applied a 43.91+ percent to the $223,411.00 total of marital property and thereby more opaquely reached the same amount of monetary award. The computation of the marital award is summarized in the attached Schedule II and the method of its satisfaction is detailed in Schedule III.

(2) *Monetary Award—Time of Payment*

Presumably Elwin will transfer the marital tangible personalty now in Frances' possession. This with the in-

tangible personalty she already has and his payment for her interest in the marital home, all amounting to $42,324.00, reduces the balance of the monetary award to $55,779.00. Thirty thousand seven hundred twelve dollars is with respect to retired pay to be received by him in the future and payable at the rate of $417.00 per month commencing April 1, 1985. This leaves a monetary award cash payment in the sum of $25,067.00 (as shown by Schedules III and IV attached). It is this latter balance due for which a scheme of payment must be devised fair to both parties.

The commissioner's report shows Elwin had more than this sum in banks but does not show whether it was in demand deposits or in some form of time deposit, the premature withdrawal of which would result in the sufferance of a penalty. There is no other evidence on the point. Therefore Elwin is given options in satisfying this portion of the marital award as shown on Schedule IV attached, namely:

The accrued award with respect to retired pay is $7,927.00 and that plus $2,140.00, or a total of $10,067.00, will be payable April 1, 1985. The remaining balance of $15,000.00 will be payable in two additional installments of $7,500.00 each, the first of them being payable August 1, 1985 and the other payable December 1, 1985. If Elwin does not have the $25,067.00 presently available or wants to stretch out the payments, these installment provisions will accommodate him. Nevertheless Frances is essentially entitled to the latter two installments forthwith and in return for his being accommodated and to compensate her for delay in receipt of them they will each bear interest from April 1, 1985 until paid at the judgment rate of twelve percent per annum.

To accommodate Elwin further and also to enable Frances to receive earlier payment of these last two installments, Elwin may anticipate payment on either one or both of them in increments as to each of them in mul-

tiples of $500.00 with interest as stated above. Elwin also has the option of paying the full $25,067.00 in one lump sum on April 1, 1985, thereby assuring Frances of early payment and himself of avoidance of interest charges.

IV. SPOUSAL SUPPORT

Upon divorce neither spouse has an absolute right to support from the other and the granting of support is discretionary with the Court. *Bristow* v. *Bristow*, 221 Va. 1 (1980). The statute on the subject, Section 20-107.1, clearly makes the matter discretionary and lists numerous factors to be considered in the exercise of that discretion. In conformance with subsection F. of Section 20-107.3 the matter of monetary award has been determined "without regard to maintenance and support awarded . . ." The obvious logic of that provision is that several of the factors under Section 20-107.1 necessary for consideration of spousal support would be unavailable for that purpose until decision had been made under Section 20-107.3. Of the factors mentioned in the former section, the financial resources of the parties has in part been determined, and the contributions of the parties to the well-being of the family and the provisions with regard to marital property in whole have been considered above and need not be dealt with further.

The standard of living during the marriage, though no extensive evidence of it was introduced, appears to have been comfortable, consistent with the expense of rearing four children, and more so after those responsibilities were discharged. Their standard after that, including the time just prior to separation, was apparently at the same level.

The property interests of the parties have been established for the most part except that since the divorce Frances has purchased with a daughter and son-in-law a home valued at $63,900, slightly less than the value of Elwin's residence which she alone occupies. Though he

owns his house free of debt hers is subject to deed of trust on which she pays $383.50 per month in charges. His financial resources which, under subsection 1 of the statute, include "all pension, profit sharing or retirement plans, of whatever nature," are greatly superior to hers, as shown on Schedule V attached. The deed of trust is her only debt obligation and he has none other than the phantom loan against insurance cash surrender value.

Elwin, now almost sixty-six, retired in 1971 at age fifty-two on seventy percent physical disability. Her earning capacity, as well as her age, she having just turned sixty-four, and the physical and mental condition of the parties, have been examined above. Considering all these factors the elements of their respective earning capacities and opportunity to secure education and training are largely academic.

Other factors of note are that Elwin's disability retired pay of $29,736.00 per year is tax free. To the extent he has taxable income his spousal support payments are deductible from his gross income. 26 USC Section 215. On the other hand such payments will be includable in the gross income of Frances and taxable. 26 USC Sections 61 and 71. To her benefit, however, is that having been married for at least twenty years to a military spouse so long as she remains unmarried she qualifies under 10 USC Section 1072 (F)(i) as a military dependent with entitlement to certain medical and dental services under 10 USC Sections 1074, *et seq.*, and under that same qualification she is entitled to commissary and post exchange privileges as though she were the surviving spouse of a retired member of the uniformed services. Pub. Law 97-252 (Uniformed Services Former Spouses' Protection Act), Section 1005.

After consideration of all the statutorily mandated factors as is required, *Bristow, supra; Brooker* v. *Brooker*, 218 Va. 12 (1977), including all the resources of the

paying spouse, *Butler* v. *Butler*, 217 Va. 195 (1976), the amount of whose investment income at this time has been discounted as too speculative, the needs of the wife then become the focal point in determining support as she "has the right to be maintained in the manner to which she was accustomed during the marriage," *Lapidus* v. *Lapidus*, 218 Va. —— (1984), but not to the extent that the amount will result in "an undue hardship on him," *Oliver* v. *Oliver*, 202 Va. 268 (1960). Giving due regard for other elements in the melange of considerations, the ultimate determination is founded on a balancing of the wife's needs with the husband's ability to pay. *Oliver*, citing *Robertson* v. *Robertson*, 215 Va. 425 (1975).

As a result the spousal support is set in the sum of $1,000.00 per month commencing April 1, 1985. This will not by any means reduce Elwin to penury or be any undue hardship on him. At the same time it should, in view of her other resources, resulting principally from the marital award, meet the needs of Frances and enable her to live comfortably to an extent not dissimilar from the standard of living enjoyed during the marriage, and at the same time afford a like opportunity to Elwin. Note is made of the fact that on Schedule V part of the money available for Frances' living expenses is attributable to income from investments which she will be able to make. She has already done so with a portion of the liquid funds she previously received by way of monetary award. Such income is included as being a reasonable income-producing option to her. It will be her decision whether to take this option or expend the principal either to reduce the secured obligation on the house or on a higher living standard. In any event her comfort, at least for the present, is assured. Her permanent support is slightly more than one-third greater than her most recent award of temporary support, but this is not unusual as temporary support is generally in an amount "to hold the fort" until the factors of fault, need and ability to

pay can be more fully presented by the evidence and more maturely considered by the Court.

V. ATTORNEY FEES AND COSTS

Based on the submission and claim of her attorney she is awarded counsel fees and expenses in the sum of $3,000.00 against which $350.00 has previously been paid by way of temporary counsel fee. The balance of $2,650.00 of the total allowed will be payable not later than July 1, 1985. The relatively modest remainder of her attorney fee will be borne by her.

The fee of the commissioner in chancery of $582.00 will be borne by the parties in the proportions of two-thirds to Elwin and one-third to Frances.

Frances' counsel will prepare draft of decree in conformance with this opinion.

/s/ Robert K. Woltz
Judge

28 March 1985

NOTE: Most of the cases cited from other jurisdictions were not available to the Court to read, and the substance of their holdings mentioned was based on the contents of articles, journals and annotations.

[Exhibits to this Opinion lodged with the Court]

APPENDIX I

VIRGINIA:

IN THE CIRCUIT COURT OF FREDERICK COUNTY

In Chancery No. 7119

FRANCES SUE POE HOLMES,
Complainant

v.

ELWIN FRANKLIN HOLMES,
Defendant

In Chancery No. 7108

ELWIN F. HOLMES,
Complainant

v.

FRANCES SUE POE HOLMES,
Defendant

TRIAL DECREE

This case came before the Court on June 13, 1983, for a trial on the issue of the grounds of divorce of the parties and the determination of temporary support for the Wife. The parties appeared in person and with their counsel.

Counsel for Frances Sue Holmes asked the Court to consolidate the divorce suit which she had filed with that filed by her husband, to which there was no objection by the husband. The Court did, therefore, ADJUDGE and

DECREE that Chancery causes 7119 and 7108 be consolidated for further proceedings.

Whereupon, Elwin F. Holmes introduced evidence in support of his prayer for divorce, at the conclusion of which it appeared to the Court, independent of the admissions of either party, by pleadings or otherwise that:

1. The parties were married on March 7, 1942 in San Antonio, Texas.

2. Four children were born of said marriage, all of whom are over the age of twenty-one years.

3. The parties have been actual bona fide residents and domiciliaries of the State of Virginia for more than six months next preceding the commencement of this suit.

4. The parties are over the age of eighteen years, and neither of them is in the active military service of the United States.

5. The parties last cohabited in Frederick County, Virginia on March 1, 1982, from which time they have lived separate and apart continuously, without cohabitation and without interruption for more than one year.

Accordingly, the Court did grant Elwin F. Holmes' prayer for divorce and proceeded to hear evidence upon Frances Sue Holmes' entitlement to spousal support and evidence on the question of the amount of temporary spousal support, if awarded. Frances Sue Holmes then proceeded to introduce evidence in her behalf, at the conclusion of which counsel for Elwin F. Holmes moved the Court to strike her prayer for spousal support on the ground that she had not proven by the greater weight of the evidence that she was entitled to support from her Husband and that she was guilty, which would constitute a fault ground for divorce, which motion was overruled by the Court over the objection of counsel for Elwin F. Holmes.

Elwin F. Holmes then proceeded to introduce further evidence on his behalf, at the conclusion of which, the Court found from the evidence that Elwin F. Holmes had not proven that Frances S. Holmes was guilty of such conduct which constituted a fault ground for divorce, thereby forfeiting her right to spousal support in that he had failed to prove that it was her intent on March 1, 1982 to permanently desert the marital relationship, whereupon the Husband again moved to strike the evidence of the Wife as to her claim for temporary support and to deny her the same, which motion the Court denied and overruled to which ruling the Husband duly objected and excepted. It is therefore, ADJUDGED and DECREED that:

1. Elwin F. Holmes is hereby granted a final divorce from Frances Sue Holmes, pursuant to Virginia Code Section 20-91(9)(a), on the ground that the parties have lived separate and apart without cohabitation and without interruption for more than one year.

2. Frances S. Holmes is entitled to receive temporary spousal support from Elwin F. Holmes and that the amount of said spousal support shall be temporarily set in the amount of Five Hundred Thirty-one Dollars ($531.00) payable on the first day of each month until further Order of this Court.

3. Elwin F. Holmes shall pay to John E. Wetsel, Jr., Counsel for Frances S. Holmes, the sum of Three Hundred Fifty Dollars ($350.00), payable within ten days of the entry of this Decree, as a partial award of attorney's fees incurred in this cause, the ultimate award of attorney's fees to be determined upon the final resolution of this case.

4. This case is set for trial on August 12, 1983 before this Court at 2:30 p.m., or as soon thereafter as counsel may be heard upon the following issues:

A. The issue of equitable distribution of the joint marital property of the parties; and

B. The amount of permanent spousal support, if any, payable to Frances S. Holmes.

However, it is to be understood that in the event the parties have not reached an agreement as to the valuation of the parties' property, that that matter will be referred to a Commissioner in Chancery, because the Court will not hear evidence on the valuation of the property. In the event that a valuation has not been agreed upon by the parties, and the matter has to be referred to a Commissioner for that purpose, said trial will be continued until the report of that Commissioner.

ENTERED this 3rd day of August, 1983.

/s/ Robert K. Woltz
Judge

SEEN AND OBJECTED TO:

/s/ John E. Wetsel, Jr.
JOHN E. WETSEL, JR.
Counsel for Frances S. Holmes

SEEN:

/s/ Joseph A. Massie, Jr.
JOSEPH A. MASSIE, JR.,
Counsel for Elwin F. Holmes

Supreme Court, U.S.
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No. 89-139

In The

Supreme Court of the United States

October Term, 1989

ELWIN F. HOLMES,

Petitioner,

v.

FRANCES SUE P. HOLMES,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Respondent, Frances Sue P. Holmes, respectfully asks that the Petition for a Writ of Certiorari sought by Petitioner to review the judgment of the Supreme Court of Virginia entered on April 26, 1989, be denied.

STATEMENT OF THE CASE

Respondent submits the following "additions" to the Statement of the Case prepared by Petitioner. References to the Appendicies to the Petition for a Writ of Certiorari are cited herein as "App., p. ___a."

The parties in this cause were married for nearly 40 years, and had raised four children when they separated through no fault of the wife. During two years of litigation through the *pendente lite* support hearing, the trial on the issue of the grounds of the divorce of the parties, hearings on motions to adjust the temporary support, and in the equitable distribution trial, Petitioner, by his own testimony, and by affidavits and other written pleadings filed in the case, maintained that his monthly disposable retirement income was approximately $1,042, which was the basis of the trial court's decision.

The following is but a partial list of the Petitioner's representations made in the record as to his "disposable," non-disability military retirement income made during the course of the litigation:

1. May 15, 1983, answers to interrogatories: "1981 gross Disposable Retirement Income was $11,165.40; 1982 gross Disposable Retirement Income was $12,020.60." Va. Ct. App., App. p.4 (Court of Appeals of Virginia Joint Appendix).

2. June 7, 1983, Petitioner's financial affidavit filed in opposition to *pendente lite* support: "Disposable Retirement Pay . . . $1,062.00 (monthly)." Va. Ct. App., App., p.9.

3. June 13, 1983, *pendente lite hearing*, Elwin F. Holmes' testimony.

   Q. What is your percentage disability?

   A. 70 percent. So therefore 30 percent of my gross Air Force pay is disposable.

4. May 17, 1984, Petitioner's memorandum of authorities: "That your Complainant's [Elwin Holmes] disposable retirement payment is $1,042.00 per month. . . ." Va. Ct. App., App. p.27.

5. May 17, 1984, trial testimony, Elwin Holmes:

   Q. What is your non-disability or disposable income?

   A. My disposable income is $1,042 a month. (Transcript, p.47).

7. May 17, 1984, trial, oral argument, counsel for Elwin Holmes: "[H]e has a distributable income of $1,042 a month. . . ." (Va. Ct. App., App. p.153).

Almost a year after the trial court had written its extensive March 25, 1985 opinion (App., pp.42a-62a) resolving the issues of equitable distribution, the final amount of spousal support, and all outstanding issues in the case, and after the Petitioner had filed and argued exceptions to the trial court's opinion, the Petitioner raised, for the first time, objections to the basis upon which the trial court had determined his "disposable income," claiming that he had been mistaken in his earlier testimony and exhibits. He then petitioned the court to rehear the case with respect to the proper amount of his disposable income. When the trial court denied the Petitioner husband's petition for rehearing, the case had been pending for over three years. As the trial court stated in its letter opinion of December 17, 1985 (App., p.30a):

> In view of the fact that the complainant introduced evidence, made representations and advanced a theory with respect to his disposable retirement pay, and that opinion was written accepting these and was based on them in this regard the Court will not reconsider its prior opinion *or admit additional evidence on the matter.* For the sake of finality, expeditious disposition of cases and due regard for an opposing party

> the other party cannot await an opinion based on his evidence and theory of an issue and then because he is disappointed in the results obtained seek a re-hearing in order to change his theory and evidence, hopefully to achieve a different result. (Emphasis added).

REASON FOR DENYING THE WRIT

Adequate and independent state grounds support the decision of the Virginia Court of Appeals and Supreme Court.

The Supreme Court of the United States will not review a decision of a state court which rests upon adequate and independent non-federal grounds. *Bell* v. *Maryland*, 378 U.S. 226, 237, 12 L.Ed.2d 822, 84 S.Ct. 1814 (1963). *See, Colorado* v. *Nunez*, 465 U.S. 324, 79 L.Ed. 2d, 238, 104 S.Ct. 1257 (1984)(writ of certiorari dismissed as improvidently granted where judgment rested on independent and adequate state grounds). Where adequate state grounds exist, this rule is applied by the Supreme Court no matter what the Supreme Court may say about the merits of the federal issue. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566, 53 L.Ed.2d 965, 97 S.Ct. 2849 (1977).

In the Court of Appeals of Virginia, the Petitioner husband contended that the trial court erred in failing to grant his petition for a rehearing. However, the Court of Appeals of Virginia ruled that:

> We do not agree, however, that the trial judge abused his discretion in dismissing the petition [for a rehearing].

> After a court has concluded an evidentiary hearing "during which each party has ample opportunity to present evidence, it [is] within the court's discretion to refuse to take further evidence on this subject." . . . Although the trial judge's letter ruling did not specifically address the issue whether there was an error on the face of the record, its ruling implies a finding that there was no such error. We agree. App. at pp.9a-10a.

As noted by the Virginia Court of Appeals decision interpreting Virginia procedural rules (App. 11a):

> The trial judge's ruling did not constitute any error on the face of the record, because 10 U.S.C. § 1401 merely provides the basis upon which to calculate the total retirement pay, and does not designate the amounts of pay allotted to disability pay versus non-disability pay. . . .
>
> Moreover, since the husband's second proposed method of computation was available at the beginning of the proceedings, *he has no ground upon which to contend that he should have been granted a rehearing on the basis of after-discovered evidence*. . . .Furthermore, the judge derived his finding concerning disposable retirement income from the husband's testimony and affidavit that his disposable retirement income was in fact $1,042 per month.

Findings of fact found by the lower court and adopted by the highest court of a state, when supported by competent testimony, will not ordinarily be re-examined in the Supreme Court on writ of error to a state court. *Portland R.L. & P. Co.* v. *Railroad Commission*, 229 U.S. 397, 411-412, 57 L.Ed. 1248, 33 S.Ct. 820 (1913). The state court correctly applied the law that only the disposable, non-disability pay was divisible in accordance

with *Mansell* v. *Mansell*, ___U.S.___ (No. 87-201, May 30, 1989). The amount of Colonel Holmes' disposable pay was an issue of fact, not of the law, as determined by the evidence admitted by the trial court. *See*, trial court opinion, App. p.48a: "The conclusion then is that Elwin's military disability benefits must be excluded from the marital property of the parties and must not be used to give an indirect effect in the equitable distribution of that property."

Trial courts in Virginia apply a rule of evidence common to many courts in the United States:

> No litigant can successfully ask a court or jury to believe that he has not told the truth. His statements of facts and the necessary inferences therefrom are binding upon him. He cannot be heard to ask that his case be made stronger than he makes it, where, as here, it depends upon the facts within his own knowledge and as to which he has testified. *Massie* v. *Firmstone*, 134 Va. 450, 462, 114 S.E. 652, 656 (1922).

It is well settled that states have the power to prescribe and apply rules of evidence and rules of procedure so long as they do not violate constitutional requirements or deprive any person of his constitutional rights. A hearing before judgment with full opportunity to present all of the evidence and arguments, which a party deems important, is all that can be adjudged vital under the guaranty of due process of law. Findings by the trial court made in connection with "what in effect was a motion for a new trial on newly discovered evidence must remain undisturbed except for most extraordinary circumstances." *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 358, 9 L.Ed.2d 357, 83 S.Ct. 448 (1963).

In the Commonwealth of Virginia, the procedures by which a court may review its decision following their pronouncement is a creature of both statutory law and *stare decisis*. *Virginia Code* § 8.01-623 specifies the time within which a bill of review is to be filed, and *Va. Code Anno.* § 8.01-680 provides that:

> . . . [W]hen a case is decided by a court without the intervention of a jury, and a party objects to the decision on the ground that it is contrary to the evidence, the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it.

The Petitioner argues in this case that there was no evidence to support the trial court's ruling, because the evidence on which the trial court rendered its decision was erroneous. However, the Petitioner overlooks the fact that the record upon the trial court made its decision was based upon the determination of Petitioner's disposable retirement income as represented to the court repeatedly by the Petitioner himself. Perpetuation of that error of fact by the Petitioner, if error it was, was done on numerous occasions, both by the Petitioner and his counsel. The issue is really whether the trial court abused its discretion in refusing to allow the Petitioner to reopen his case almost a year after the trial court had finally made its decision and heard argument on exceptions by Petitioner to that opinion. The Court of Appeals of Virginia considered this question and ruled upon it based upon well established principles of Virginia law, and, therefore, an adequate and independent state ground clearly supports the state court's decision in this case.

CONCLUSION

The petition for a writ of certiorari should be denied because the action of the Court of Appeals of Virginia and the Supreme Court of Virginia in affirming the trial court was entirely proper. The decision as to whether to reopen the case at the conclusion of the evidence after a lapse of nearly a year after the trial court has rendered its written opinion was solely within the trial court's discretion. The Court of Appeals of Virginia has reviewed the trial court's exercise of that discretion under the procedural rules applied in the Commonwealth of Virginia, and has decided that the trial court did not abuse its discretion, or incorrectly apply Virginia law, and that decision should not be reviewed by this court.

Respectfully submitted,

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Date: August 21, 1989

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No. 88-139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ELWIN F. HOLMES,
Petitioner,

v.

FRANCES SUE P. HOLMES,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

Whether state courts, consistent with the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Sec. 1408 (1982 ed. and Supp V), may treat, as property divisible upon divorce, a portion of military retirement pay waived by the retiree in order to receive physical disability benefits under Chapter 61, Section 1201 of Title 10 of the United States Code.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-139

ELWIN F. HOLMES,
Petitioner,

v.

FRANCES SUE P. HOLMES,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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PETITIONER'S REPLY BRIEF

INTRODUCTION

The decisions of the Supreme Court of Virginia, the Court of Appeals of Virginia, and the trial court are not based on an independent and adequate state ground because the state court's procedural law holding is solely dependent on the interpretation of federal law governing the calculation and treatment of military service members' retired and disability pay.

A. Independent and Adequate State Grounds

Respondent's only argument for denying the petition for a writ of certiorari in the present case is that the state court decisions below rest on an independent and

adequate state ground.[1] When the decision of a state court rests on independent and adequate state grounds, the Supreme Court of the United States will exercise judicial restraint and will decline to review the state court decision.[2] The Supreme Court exercises judicial restrain in such cases out of "its respect for state courts and its reluctance to issue advisory opinions which would not be binding on the state courts." [3]

In determining whether a state court decision is based on an independent and adequate state ground, the Supreme Court must first decide "whether the state court decision [is] grounded on *independent* state law." [4] The clearest example of a state court decision based on an *independent* state ground is where "the state court *plainly states* that . . . its decision [rests] sole[ly] on . . . an interpretation of the state's constitution." [5]

If the Court determines that a state court decision is "based on an identifiable, independent state ground, the Supreme Court must then [decide] if that independent

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[1] Respondent argues that the "decision as to whether to reopen the case [to consider the requirements of federal law] at the conclusion of the evidence . . . after the trial court has rendered its written opinion was solely within the trial court's discretion." Respondent's Brief at 8. Because the Virginia Supreme Court and the Court of Appeals of Virginia held that the trial court did not abuse its discretion in refusing to reopen the evidence, Respondent contends that the "decision [of the trial court] should not be reviewed by this court." *Id.*

[2] *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). *See also Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 635-36 (1875).

[3] D. Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 NOTRE DAME L. REV. 1079, 1084 (1984).

[4] *Id.*

[5] *Id.* at 1084-85 citing *e.g.*, *People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied sub nom., California v. Anderson*, 406 U.S. 958 (1972) (emphasis added).

state ground [is] adequate to support [the] state court decision." *Id.* at 1085. Here "[a]gain, the [clearest] case is where the state court . . . *specifically declare*[s that] a state statute or regulation [is] invalid under the provisions of the state constitution." [6]

B. Federal and State Grounds Intertwined

Where a decision of a state court rests on both federal and state grounds, the Supreme Court must "ascertain for itself . . . whether the asserted [state or] non-federal ground independently and adequately supports the judgment." *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931). If "the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breath to sustain the judgment without any decision of the other," the Supreme Court will exercise jurisdiction over the issue presented. *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917). *See Creswill v. Knights of Pythias*, 225 U.S. 246, 261 (1912). However, if "the non-federal ground has fair support, [the Supreme Court is] not at liberty to inquire whether [the state court decision] is right or wrong, but must accept it, as [the Court does] other state decisions of non-federal questions." 243 U.S. at 164.

C. *Michigan v. Long*

In deciding if an independent and adequate state ground exists in cases where the decision of a state court appears to rest on both federal and state grounds, the Supreme Court in *Michigan v. Long*, 463 U.S. 1032 (1983), stated that it would apply the following analysis:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not

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[6] *Id.* (emphasis added).

> clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 1040-41. This rule makes it easy for the Court to decide if a state court decision was decided on an independent and adequate state ground when a state court opinion cites both federal and state law. If both federal and state authorities are cited in a state court opinion and the opinion lacks a "plain statement" that the court's decision rests on state grounds, the Supreme Court will assume that the state court decision rests on federal law.[7]

D. Present Case

In the present case, both the Court of Appeals of Virginia and the trial court discuss federal law in their opinions and acknowledge that the division of Petitioner's disability retirement benefits in a divorce action are governed by the Former Spouses' Protection Act. App. 6a-11a; App. 39a-41a; App. 45a-49a. In its March 28, 1985 opinion, the trial court specifically refers to the "Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408" and notes that "[t]he commissioner's report takes no cognizance of [Petitioner's] Air Force retirement benefits." App. 45a. The trial court then observes that "[a]t the time of the divorce these amounted to $3,540.00 monthly. Of this, $1,062.00 represents his retired pay and the balance, or $2,478.00, his

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[7] *See Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987) (no "plain statement" in the opinion stating that the decision rests on upon adequate and independent state grounds); *New York v. Class*, 475 U.S. 106, 109 (1986) (opinion lacks the requisite "plain statement" that it rests on state grounds); *Delaware v. Van Arsdall*, 475 U.S. 673, 678 n.3 (1986) (opinion lacks requisite "plain statement" that it rests on state grounds); *New York v. P.J. Video, Inc.*, 475 U.S. 868, 872-73 n.4 (1986) (absent "plain statement," the Court will conclude that Court of Appeals decision was premised on federal law).

disability retirement." *Id.* The trial court concluded that "[b]y virtue of [Virginia law], in conjunction with 10 U.S.C. Section 1408[, Petitioner's] armed forces retired pay . . . is marital property" subject to division on divorce. App. 46a. The trial court noted, however, that the $2,478.00 Petitioner received each month in disability benefits was not subject to division upon divorce in light of the provisions of subsection (a)(4) of the Former Spouses' Protection Act which "specifically exempts from its operation retired disability pay." App. 48a.

In its July 30, 1985 opinion, the trial court agreed to consider "the legal position of [Petitioner] . . . of whether military person['s] retired under 10 U.S.C. 1201 are entitled to have their retired pay exempt from distribution upon divorce" under the Former Spouses' Protection Act. App. 41a. In its December 17, 1985 and July 8, 1986 opinions, however, the trial court denied Petitioner's motion for reconsideration on this issue and the issue of how much of Petitioner's disability retired pay is subject to distribution under federal law in a divorce action. App. 28a; App. 23a. In denying Petitioner's motion, the trial court did *not plainly state* that its decision was based on an independent and adequate state ground.

The Court of Appeals of Virginia in its December 20, 1988 opinion notes that Petitioner "filed exceptions to the [trial court's] ruling, contending that since he was retired for disability reasons, his entire retirement pay was not 'disposable' under 10 U.S.C. S 1408(a)(4) and [that] therefore [it] was not available for distribution by monetary award." App. 6a. In connection with this issue, the Court of Appeals of Virginia analyzed 10 U.S.C. § 1401 and concluded that:

> The trial judge's ruling, however, does not constitute an error on its face because 10 U.S.C. § 1401 merely provides the basis to calculate the total retirement pay and does not designate the amounts of

> pay allotted to disability pay versus non-disability pay. Although the record indicates that the husband's monthly taxable income is $236, this evidence alone *does not necessitate a finding that an error in the method of determining the amount of disposable retirement was made.*

App. 11a (emphasis added). Based on its analysis of 10 U.S.C. § 1408(a)(4) and 10 U.S.C. § 1401, the Court of Appeals of Virginia concluded that the trial court did not abuse its discretion in failing to grant Petitioner's motion for a rehearing on the federal law issues he raised. App. 12a. Like the trial court, the Court of Appeals of Virginia opinion did *not state* that its decision was based on an independent and adequate state ground.

The Court of Appeals of Virginia and the trial court relied heavily on the interpretation of federal law in denying Petitioner's request for a rehearing. Based on the state courts' interpretations of federal law governing the calculation of military retired pay and the treatment of such pay in state divorce actions, the Virginia courts concluded that Petitioner's motion was a request for a rehearing on the basis of "after discovered" evidence, and that his motion was properly denied under state procedural law. App. 23a-24a; App. 12a.

At the trial level, Petitioner argued that he was entitled to a rehearing, not on "after discovered" evidence but on an "error on the face of the record," namely, the failure of the trial court to follow federal law governing the calculation and treatment of Petitioner's disability retired pay. App. 10a. *See* App. 32a-33a. It is Petitioner's contention, that the issue of whether his disability retired pay was subject to division under provisions of the Former Spouses' Protection Act, was not a factual matter to be raised as "after discovered" evidence, but rather was a matter of law involving the interpretation and application of federal statutes in his state divorce action. Petitioner contends, in other words, that the

amount of his disability retired pay was not a factual matter to determined by a trier of fact based on the evidence submitted by the parties, but was a matter of law to be determined by the trial court based on calculations using government formulas provided in federal statutes. The purpose of these formulas, Petitioner contends, is to ensure that the disability retired pay of military service members is figured uniformly throughout the nation and not left to the discretion of military retirees or federal or state officials.[8]

Petitioner submits that (1) the failure of the trial court to follow federal law on the question of whether Petitioner's pay was exempt from distribution under provisions of the Former Spouses' Protection Act, and (2) the failure of the trial court to follow federal law on the question of determining the amount of Petitioner's disability retired pay, are errors on the face of the record that Petitioner was required to bring to trial court's attention as soon as he became aware of them.

In sum, the Virginia courts concluded that Petitioner's disposable retired pay was a factual matter to be determined by the trier of fact and not a matter of law to be decided in accordance with federal statutes. Because the trial court considered Petitioner's disability retired pay to be a matter of fact, it denied Petitioner's motion for a rehearing on the grounds that he was trying to introduce "after discovered" evidence. In denying Petitioner's motion, the trial court denied Petitioner an opportunity to have his disability pay held exempt from distribution and to have the amount of his disposable retired pay determined by federal statute.

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[8] Respondent contends that the "amount of Colonel Holmes' disposable pay was an issue of fact, not of the law, as determined by the evidence admitted by the trial court . . ." App. 48a. Respondent's Brief at 6.

E. Federal Law Holding Integral to State Court Disposition

Where the Supreme Court decides that the procedural ruling relied upon by a state court turns on an interpretation of federal law, then the state procedural ruling is not an independent and adequate state ground supporting the court's judgment. In *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380 (1986), the Supreme Court stated that:

> [W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded. . . . In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (citing *Herb v. Pitcairn*, [324 U.S. 117, 126 (1945)]; *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917).

Id. at 388. As noted, the resolution of the state procedural law question in the present case depends on whether Petitioner's disability retired pay was exempt from division under provisions of the Former Spouses' Protection Act. If it was not exempt, then the resolution of the state procedural issue depends on whether the amount of Petitioner's disability retirement pay was a *factual matter* to be determined by the trier of fact based on the presentation of evidence by the parties or was a *matter of federal law* to be determined by the trial court in accordance with federal statutes.

CONCLUSION

Petitioner submits that the decisions of the Virginia courts are not supported by an independent and adequate state ground for two reasons:

First, none of the state court decisions contain a "plain statement" that the decision of the trial court rests on an independent and adequate state ground. *See Michigan v.*

Long, 463 U.S. 1032, 1042 (1983). While the opinions of the Court of Appeals and the trial court discuss both federal and state law, none of the state court opinions contain a "plain statement" that the trial court's holding is based on an independent and adequate state ground.

Second, it is clear that the resolution of the state procedural question is intertwined with the federal statutes and depends on an interpretation of federal law, namely how military retired and disability pay is calculated under 10 U.S.C. § 1401 and how military disability retired payments are treated under the provisions of section 1408 of the Former Spouses' Protection Act. Since the state procedural law holding is not independent of federal law, the Supreme Court has jurisdiction to hear the issue presented in this case.

Because "the federal-law holding is integral to the state court's disposition of the matter," the Supreme Court's ruling on the issue in the present case is not an advisory opinion.[9] In addition, it is critical that there be uniformity throughout the states in the way military service members' retired and disability pay is calculated and treated in divorce actions under provisions of the Former Spouses' Protection Act. Military retired and disability pay cannot be calculated by the state courts in 50 different ways and treated differently by the state courts under the Former Spouses' Protection Act. Federal law clearly prescribes how military retired and disability pay is to be calculated and how it is to be treated when it becomes the subject of division in a state divorce proceeding. The calculations to be made and how the pay is to be divided in divorce actions are not factual matters to be determined by the triers of fact after considering the evidence presented by the parties, but are matters of law to be determined by the trial courts.

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[9] *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380, 388-89 (1986).

For the reasons stated, Counsel for the Petitioner respectfully requests that the Supreme Court of the United States grant the petition for a writ of certiorari in the present case (1) because the decisions of the Supreme Court of Virginia and the Court of Appeals of Virginia are not based on an independent and adequate state ground; (2) because the decision of the Supreme Court of Virginia is in conflict with the Supreme Court of the United States' recent decision in *Mansell v. Mansell*, —— U.S. —— (No. 87-201, May 30, 1989); (3) because the decision of the Supreme Court of Virginia ignores the "plain and precise" language of Section 1408(a)(4)(E) of the Former Spouses' Protection Act (1982 ed. and Supp. V); and (4) because the decision of the Supreme Court of Virginia ignores the language of Section 104(a)(4) of the Internal Revenue Code which provides that Petitioner's nontaxable disability benefits are not to be reclassified and treated as taxable income for purposes of dividing property in a state divorce action.

Respectfully submitted,

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